National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1561–08 OF 2019
AZIZAH NAWAWI, RAVINTHRAN AND NANTHA BALAN JJCA
30 AUGUST 2023

Tort — Breach of confidence — Disclosure of confidential information — Staff of respondent leaked confidential information of appellant and disclosed to third parties — Appellants' claim for loss and damage against respondent dismissed by High Court — Whether respondent breached its statutory, contractual, and/or fiduciary duties of confidentiality as financial institution in failing to protect their customers' personal and financial information

This was an appeal against the decision of the High Court judge ('HCJ') in dismissing the appellants' ('plaintiffs') claim against the respondent ('the bank'). The plaintiffs were customers of the bank. The plaintiffs' claims were for loss and damage arising out of the bank's wrongful disclosure of certain confidential banking information ('the confidential information') which was said to be in breach of the bank's statutory, contractual, and/or fiduciary duties of confidentiality as a financial institution in failing to protect their customers' personal and financial information. It was alleged that that the bank had breached banking secrecy and disclosed the confidential information relating to the plaintiffs' bank accounts to third parties and that by reason of such disclosure, one Rafizi Ramli ('Rafizi') was able to hold a press conference on 7 March 2012 whereby these banking details were made public. The wrongful disclosure was in the form of documents labelled in five enclosures ('the impugned documents'). Rafizi released the documents containing the confidential information together with a write-up or alleged 'expose' captioned as 'Bukti Bagaimana Dana Awam Untuk Projek Fidlot (sic) Digunakan Sebagai 'Jaminan' Pinjaman Peribadi Untuk Membeli 8 Unit Hartanah Mewah Di KL Eco City, Bangsar'. Eventually, it was discovered that the person who initially leaked the confidential information was a clerical staff of the bank's Jinjang Branch, one Johari bin Mohamed ('Johari'). Cheam Chen Hooi ('Cheam') was the officer-in-charge of the Jinjang Branch's Credit Department and it was his duty to supervise officers and clerks, including Johari. Arising from the complaint made by the fifth plaintiff, the bank conducted internal investigations and action was taken against Cheam and Johari. The bank issued a stern warning to Cheam and for Johari, after the bank had completed its internal investigations, they held a domestic inquiry against him. The investigating officer was one Veronica Foo ('Foo'). On the same day of the domestic inquiry, Johari resigned. The domestic inquiry panel later found Johari guilty of the charges of misconduct that were levelled against him. In

dismissing the claim, the HCJ completely exonerated the bank from any culpability, responsibility or legal liability for the wrongful disclosure. Hence, this appeal. The plaintiffs argued that the HCJ had erred in fact and/or in law in finding that the bank had performed or discharged its duty of confidentiality with reasonable care and skill by putting in place policies and procedures to safeguard the confidentiality of its customer's information and transactions, including the plaintiffs. Hence, this appeal.

Held:

(1) The plaintiffs' claim based on a breach of s 97(1) of the Banking and Financial Institutions Act 1989 ('the BAFIA') and breach of fiduciary duties was rejected as s 97 of the BAFIA was targeted at and criminalised the wrongful conduct of the individuals within the bank for breaching banking secrecy. Additionally, there was no element of investment advisory work that was undertaken by the bank such as may perhaps place the bank in a fiduciary capacity vis a vis the plaintiffs (see paras 73 & 75).

(2) At the domestic inquiry the bank proceeded on the basis that the impugned documents were the bank's documents. However, Foo's testimony during the trial was fundamentally at variance from what she said before the domestic inquiry panel. It was always the bank's position that the documents contained information relating to the plaintiffs' accounts with the bank and this had indeed emanated from the bank and Johari was responsible for the extraction of this confidential information and disclosing it to third parties. That the impugned documents were not the bank's documents was a convenient, self-serving position to take at the trial so as to exculpate the bank from liability for the most egregious and outrageous public disclosure of the plaintiffs' banking information. It was clearly an afterthought. The judge took a wrong turn in accepting the bank's evidence and concluding that the impugned documents were not the bank's documents (see paras 90, 92–93 & 95–96).

(3) It would take very little to tilt the probabilities in favour of the conclusion that it was Johari who had handed over the impugned documents to third parties and these then eventually found their way into Rafizi's hands. Additionally, there was no evidence that any of the confidential information was in the public domain prior to 7 March 2012. The judge's decision that the plaintiffs had failed to prove that the bank had breached the implied duty of confidentiality and secrecy was plainly wrong. Hence, appellate intervention was warranted and the appeal on liability was allowed (see paras 103, 108 & 114–115).

(4) There was no appealable error to warrant any appellate interference in this case vis a vis damages. The bank clearly did not 'gain' from the

wrongful disclosure by Johari. At the same time, because of PW3's inadequate and unconvincing evidence on damages that were said to have been suffered by the plaintiffs as a result of Johari's wrongful disclosure, the claim for general damages was dismissed. As the plaintiffs had succeeded on liability but had failed to prove damages, nominal damages were ordered. Therefore a sum of RM10,000 as nominal damages was awarded (see paras 125–126 & 131).

(5) The plaintiffs had proven that the bank was in breach of their implied contractual duty to maintain and protect the confidential information. Thus, the plaintiffs were indeed successful parties, albeit that they were awarded nominal damages. The plaintiffs were entitled to costs of the proceedings and as such, the costs ordered by the High Court in the sum of RM350,000 was set aside. The bank was ordered to pay RM500,000 to the plaintiffs as costs (see paras 136–138).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi ('HMT') dalam menolak tuntutan perayu ('plaintif') terhadap responden ('bank'). Plaintif adalah pelanggan bank. Tuntutan plaintif adalah untuk kerugian dan ganti rugi yang timbul daripada pendedahan salah maklumat perbankan sulit tertentu ('maklumat sulit') oleh bank yang dikatakan pelanggaran kewajipan kerahsiaan statutori, kontrak, dan/atau fidusiari bank sebagai institusi kewangan kerana gagal melindungi maklumat peribadi dan kewangan pelanggan mereka. Didakwa bahawa bank telah melanggar kerahsiaan perbankan dan mendedahkan maklumat sulit berkaitan akaun bank plaintif kepada pihak ketiga dan bahawa disebabkan pendedahan tersebut, seorang Rafizi Ramli ('Rafizi') dapat mengadakan sidang akhbar pada 7 Mac 2012 di mana maklumat perbankan ini didedahkan kepada umum. Pendedahan salah adalah dalam bentuk dokumen yang dilabelkan dalam lima lampiran ('dokumen yang dipertikaikan'). Rafizi mengeluarkan dokumen yang mengandungi maklumat sulit bersama dengan tulisan atau 'dedahan' yang didakwa bertajuk 'Bukti Bagaimana Dana Awam Untuk Projek Fidlot (sic) Digunakan Sebagai 'Jaminan' Pinjaman Peribadi Untuk Membeli 8 Unit Hartanah Mewah Di KL Eco City, Bangsar'. Akhirnya, didapati bahawa individu yang pertama kali membocorkan maklumat sulit itu adalah seorang kakitangan pejabat di cawangan bank di Jinjang, seorang Johari bin Mohamed ('Johari'). Cheam Chen Hooi ('Cheam') adalah pegawai yang bertanggungjawab dalam Jabatan Kredit Cawangan Jinjang dan adalah tanggungjawabnya untuk menyelia pegawai dan kerani, termasuk Johari. Berikutan aduan yang dibuat oleh plaintif kelima, bank telah menjalankan siasatan dalaman dan tindakan diambil terhadap Cheam dan Johari. Bank mengeluarkan amaran tegas kepada Cheam dan untuk Johari, setelah bank menyelesaikan siasatan dalaman, mereka mengadakan siasatan domestik terhadapnya. Pegawai penyiasat adalah Veronica Foo ('Foo'). Pada hari yang

A sama dengan siasatan domestik, Johari meletak jawatan. Panel siasatan domestik kemudiannya mendapati Johari bersalah atas tuduhan salah laku yang dikenakan ke atasnya. Dalam menolak tuntutan, HMT sepenuhnya membebaskan bank daripada sebarang kesalahan, tanggungjawab atau liabiliti undang-undang untuk pendedahan salah tersebut. Oleh itu, rayuan ini. B Plaintif berpendapat bahawa HMT telah melakukan kesilapan dalam fakta dan/atau undang-undang dengan mendapati bahawa bank telah melaksanakan atau menjalankan kewajipan kerahsiaan dengan berhati-hati dan kemahiran dengan membentuk polisi dan prosedur untuk melindungi kerahsiaan maklumat dan transaksi pelanggan mereka, termasuk plaintif. Oleh itu, rayuan C ini.

Diputuskan:

(1) Tuntutan plaintif berdasarkan pelanggaran s 97(1) Akta Bank dan D Institusi Kewangan 1989 ('BAFIA') dan pelanggaran kewajipan fidusiari ditolak kerana s 97 BAFIA mensasarkan dan menjenayahkan tindakan salah individu dalam bank kerana melanggar kerahsiaan perbankan. Selain itu, tidak terdapat unsur kerja nasihat pelaburan yang dilakukan oleh bank yang mungkin meletakkan bank dalam kapasiti fidusiari E terhadap dengan plaintif (lihat perenggan 73 & 75).

(2) Dalam siasatan domestik, bank berpegang pada asas bahawa dokumen yang dipertikaikan adalah dokumen bank. Namun, keterangan Foo semasa perbicaraan secara fundamental tidak selari dengan apa yang dia F katakan di hadapan panel siasatan domestik. Ia sentiasa menjadi pendirian bank bahawa dokumen tersebut mengandungi maklumat yang berkaitan dengan akaun plaintif dengan bank dan ini sememangnya datang dari bank dan Johari bertanggungjawab untuk pengambilan maklumat sulit ini dan membocorkannya kepada pihak G ketiga. Bahawa dokumen yang dipertikaikan bukan dokumen bank adalah satu kedudukan yang mudah untuk diambil semasa perbicaraan bagi membebaskan bank daripada liabiliti terhadap pendedahan maklumat perbankan plaintif yang keterlaluan. Ia jelas merupakan satu pemikiran kemudian. Hakim mengambil jalan yang salah dengan H menerima keterangan bank dan menyimpulkan bahawa dokumen yang dipertikaikan bukan dokumen bank (lihat perenggan 90, 92–93 & 95–96).

(3) Ia memerlukan sedikit sahaja untuk memiringkan kebarangkalian memihak kepada kesimpulan bahawa Johari yang telah menyerahkan I dokumen yang dipertikaikan kepada pihak ketiga dan ini akhirnya sampai ke tangan Rafizi. Selain itu, tidak terdapat keterangan bahawa mana-mana maklumat sulit berada dalam domain awam sebelum 7 Mac 2012. Keputusan hakim bahawa plaintif gagal membuktikan bahawa bank telah melanggar kewajipan kerahsiaan dan kesulitan yang tersirat

adalah jelas salah. Oleh itu, campur tangan rayuan adalah wajar dan rayuan ke atas liabiliti dibenarkan (lihat perenggan 103, 108 & 114–115).

(4) Tiada kesilapan yang boleh dirayu untuk membolehkan sebarang campur tangan rayuan dalam kes ini berkenaan dengan ganti rugi. Bank jelas tidak 'beruntung' dari pendedahan salah oleh Johari. Pada masa yang sama, kerana keterangan PW3 yang tidak mencukupi dan tidak meyakinkan mengenai ganti rugi yang dikatakan telah dialami oleh plaintif akibat pendedahan salah Johari, tuntutan ganti rugi am ditolak. Oleh kerana plaintif telah berjaya dalam liabiliti tetapi gagal membuktikan ganti rugi, ganti rugi nominal diperintahkan. Oleh itu, sejumlah RM10,000 sebagai ganti rugi nominal diberikan (lihat perenggan 125–126 & 131).

(5) Plaintif telah membuktikan bahawa bank telah melanggar kewajipan kontrak mereka yang tersirat untuk mengekalkan dan melindungi maklumat sulit. Oleh itu, plaintif adalah pihak yang berjaya, walaupun mereka diberikan ganti rugi nominal. Plaintif berhak kepada kos prosiding dan oleh itu, kos yang diperintahkan oleh Mahkamah Tinggi sebanyak RM350,000 dibatalkan. Bank diperintahkan untuk membayar RM500,000 kepada plaintif sebagai kos (lihat perenggan 136–138).]

Cases referred to

Ang Beng Choo v RHB Insurance Berhad [2013] 1 LNS 382, HC (refd)
Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd [1951] 1 All ER 873, HC (refd)
Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619; [2014] 2 CLJ 773, CA (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, SC (refd)
Coco v A N Clark (Engineers) Ltd [1969] RPC 41, HC (refd)
I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others [2020] SGCA 32; [2020] 1 SLR 1130, CA (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 1 LNS 1060; [2020] 8 AMR 227, FC (refd)
PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal [2017] SGCA 26; [2017] 2 SLR 129, CA (refd)
Pengarah Tanah dan Galian Negeri Selangor & Ors v Nusa Kota Sdn Bhd [2023] 1 MLJ 487; [2022] 10 CLJ 231, CA (refd)
Saltman Engineering Co Ltd and Others v Campbell Engineering Co Ltd [1963] 3 All ER 413, CA (refd)

Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157; [2008] 4 CLJ 217, CA (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461, CA (refd)
Wong Yeng Mun v CIMB Bank Berhad [2010] MLJU 414; [2011] 1 CLJ 785, HC (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 (repealed by the Financial Services Act 2013) s 97, 97(1), (2)
Civil Law Act 1956 ss 3, 5
Evidence Act 1950 s 114(g)
Financial Services Act 2013 s 133
Rules of Court 2012 O 24 r 10

Appeal from: *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* [2018] MLJU 766 (High Court, Kuala Lumpur)

Muhammad Shafee bin Muhamad Abdullah (with Sarah Maalini Abishegam and Noor Farhah Mustaffa) (Shafee & Co) for the plaintiffs.
Yoong Sin Min (with Tiang Min Min and Poh Choo Hoe) (Shook Lin & Bok) for the bank.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judge of the High Court ('the judge') dated 29 July 2019 (delivered after a full trial) dismissing the plaintiffs' claims in Kuala Lumpur High Court Suit No 22NCVC-623–05 of 2012 ('Suit 623') against Public Bank Bhd ('the bank'). The judge ordered the plaintiffs to pay costs of RM350,000. Suit 623 was filed on 22 May 2012. The appellants in this appeal are National Feedlot Corp Sdn Bhd (the first plaintiff), National Meat & Livestock Corp Sdn Bhd (the second plaintiff), Agroscience Industries Sdn Bhd (the third plaintiff), Real Food Company Sdn Bhd (the fourth plaintiff) and Dato' Sri Dr Mohamad Salleh bin Ismail (the fifth plaintiff) (collectively, 'the plaintiffs'). For convenience, the appellants shall be referred to collectively as 'the plaintiffs' and the respondent as 'the bank'. Where necessary, the plaintiffs shall be individually referred to

alpha-numerically as follows: (a) the first plaintiff — 'P1', (b) the second plaintiff — 'P2', (c) the third plaintiff — 'P3', (d) the fourth plaintiff — 'P4', and (e) the fifth plaintiff — 'P5'.

THE CLAIMS

[2] The plaintiffs were at all material times customers of the bank with the respective bank accounts being maintained at the bank's branch at Jalan Hang Lekiu, Kuala Lumpur. The plaintiffs had no connection whatsoever with the bank's Jinjang Branch. P5 is a shareholder and director of all the plaintiffs including P4. He was the Executive Chairman of these companies.

[3] The plaintiffs' claims are for loss and damage arising out of the bank's wrongful disclosure of certain confidential banking information ('the confidential information') which was said to be in breach of the bank's statutory, contractual, and/or fiduciary duties of confidentiality as a financial institution in failing to protect their customers' personal and financial information. Essentially, it is alleged that that the bank had breached banking secrecy and disclosed the confidential information relating to the plaintiffs' bank accounts to third parties and that by reason of such disclosure, one Rafizi Ramli ('Rafizi') was able to hold a press conference on 7 March 2012 ('the press conference') whereby these banking details were made public.

[4] At the outset, it is important to clarify that the banking details that were made public pertained to all the plaintiffs *except P4* (Realfood Company Sdn Bhd). Thus, the phrase 'the plaintiffs' in this judgment refers to all the plaintiffs *except P4*. In this regard, during the trial, P5 had conceded that P4 had no claim against the bank. As such, at the conclusion of the trial, besides dismissing the claim by all the plaintiffs, the judge specifically mentioned that P4 had no claim against the bank. But it was argued before us the judge erred in fact and/or in law in concluding that P5 had confirmed and admitted that P4 does not have any claim against the bank, when P4 was said to be the main profit centre and P5 had confirmed this fact as true when he was cross-examined by the bank's counsel.

[5] Having considered the matter carefully, we agree with the judge with respect to her approach to the question as to P4's alleged claim against the bank. Indeed, it is quite clear that the confidential information does not involve P4. And as will be seen later in this judgment, P4 is not even referred to in P5's letter of complaint dated 30 March 2012 to the bank and the letter of the same date to Bank Negara Malaysia ('BNM').

[6] Further the letter of demand issued by Messrs Shafee & Co dated 6 April 2012 also made no mention of P4. All in all, we agree with the judge

A that P4 has no claim against the bank arising out of and/or in connection with the alleged wrongful disclosure of the confidential information.

[7] We return now to the mainstream of the case. The wrongful disclosure was in the form of documents labelled in five enclosures ('*lampiran* A-E'), which were relied upon by Rafizi in a press release which were distributed to the media at the said press conference on 7 March 2012. Rafizi released the documents containing the confidential information together with a write-up or alleged 'expose' captioned as — 'Bukti Bagaimana Dana Awam Untuk Projek Fidlot (sic) Digunakan Sebagai 'Jaminan' Pinjaman Peribadi Untuk Membeli 8 Unit Hartanah Mewah Di KL Eco City, Bangsar'. In this judgment, the reference to 'impugned documents' refers to '*lampiran* A-E'.

[8] In dismissing the claim, the judge completely exonerated the bank from any culpability, responsibility or legal liability for the wrongful disclosure. Thus, before us, it was argued on behalf of the plaintiffs that the judge had erred in fact and/or in law in finding that the bank had performed or discharged its duty of confidentiality with reasonable care and skill by putting in place policies and procedures to safeguard the confidentiality of its customer's information and transactions, including the plaintiffs.

[9] Eventually, it was discovered that the person who initially leaked the confidential information was a clerical staff of the bank, one Johari bin Mohamed ('Johari') who was at all material times a clerk at the bank's Jinjang Branch. Johari was a senior clerical staff of the bank. He joined the bank as a clerk on 17 July 1995.

[10] Cheam Chen Hooi ('Cheam') was all material times the officer-in-charge of the Jinjang Branch's Credit Department and it was his duty to supervise officers and clerks, including Johari. Cheam was Johari's superior at the Jinjang Branch. Cheam's user ID was JJGBCCH which meant Jinjang Branch, Cheam Chen Hooi. Cheam said that his workload was heavy. Hence, on 16 February 2012 Cheam had asked Johari to help out on credit related work. He went over to Johari's computer to sign-in using his user ID on his (Johari's) computer to allow him access to restricted areas of the bank's computer system, eg, 'Customer Profile — Balance Summary' ('CP-BS'). Johari was asked to attend to matters such as discharge of charge, redemption, release of loan and other credit related work.

[11] Cheam said that he trusted Johari and expected him to use his user ID solely for the purpose of performing the list of credit work given to him. He said that he walked to Johari's computer now and again to check on the credit information that he had pulled out and once the work was completed he (Cheam) then logged out using his user ID. He said he was unaware that on the

morning of 16 February 2012 Johari had accessed the computer system and printed the CP-BS belonging to the plaintiffs.

[12] In his evidence-in-chief, Cheam said that he trusted Johari due to his long service with the bank and did not expect Johari to 'misuse' his user ID and print information which he had no authority to access. Arising from the complaint that was made by P5 (per the letter dated 30 March 2012), the bank conducted internal investigations and action was taken against Cheam and Johari. It is quite clear that the bank was unaware as to what Johari had done on 16 February 2012 and it was only after P5 had sent his strongly worded letter of complaint (copied to BNM) and after the bank's investigations had concluded that the bank became aware of Johari's nefarious conduct.

[13] The bank issued a stern warning to Cheam and forfeited 50% of his performance bonus for 2012. Cheam said that he regretted what he had done. Before us, counsel for the plaintiffs said that Cheam was just given a 'slap on the wrist' for his conduct in allowing Johari to gain access to the IBM mainframe and extract the CP-BS information.

[14] In so far as Johari was concerned, after the bank had completed its internal investigations, they held a domestic inquiry ('the domestic inquiry') against him on 2 May 2012. The investigating officer was Ms Veronica Foo ('Foo'). Foo testified before the domestic inquiry panel as 'W1'. The officer who investigated the matter in respect of information technology matters eg to track and identify who had accessed the IBM mainframe etc was Fam Yoke Yong ('Fam'). She too testified before the domestic inquiry panel. Johari attended and participated in the inquiry. On the same day of the domestic inquiry, Johari resigned. The domestic inquiry panel later found Johari guilty of the charges of misconduct that were levelled against him.

[15] It would be convenient to mention here that the plaintiffs made a formal application (encl 107 — filed on 12 January 2016) for discovery to obtain the notes of the domestic inquiry. The plaintiffs had initially issued a notice to produce under O 24 r 10 of the Rules of Court 2012 via encl 103 (Form 41) which was filed on 29 December 2015. But the bank objected to encl 103 and claimed that the documents sought were: (a) confidential and privileged; and (b) that they were *irrelevant* to the action. The plaintiffs then filed encl 107 which was vehemently opposed by the bank.

[16] On 13 April 2016 (encl 129) Justice John Louis O'Hara allowed encl 107 and ordered the bank to disclose the following, 'Segala dokumen-dokumen dan transkrip-transkrip siasatan dalaman yang telah dibuat berkenaan dengan pekerja Defendan, iaitu Johari bin Mohamad

A sebagaimana yang dinyatakan antara lain pada perenggan-perenggan 10 dan 18 Pembelaan Terpinda Semula bertarikh 20.9.2013'. There was no appeal by the bank against encl 129.

B **[17]** It is clear from the record that the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 (HC) ('Yekambaran') was referred to during the arguments in respect of encl 107. The significance of *Yekambaran*'s case is that the High Court *would* have considered all the relevant facts and circumstances attendant upon the discovery application and duly applied the law as enunciated in that case, namely that: (a) there must be a document; (b) the *document must be relevant*; and (c) the document must be or have been in possession, custody or power of the person against whom the order for discovery or production of document is sought.

D **[18]** But along the way during the trial, based on an objection which was taken by the bank's counsel, the judge made a ruling that the domestic inquiry was irrelevant to the action before her and somewhat impeded counsel for the plaintiffs from referring the bank's witness to the notes of proceedings for the E domestic inquiry.

[19] We will come back to this topic in the later part of the judgment, but for now it would suffice for us to state that the High Court's earlier decision to allow encl 107 meant that the issue of 'relevancy' of the domestic inquiry's F notes of proceedings was res judicata and was not capable of being revisited during the trial in the way that was done in this case. In this regard it is apt for us to refer to the case of *Pengarah Tanah dan Galian Negeri Selangor & Ors v Nusa Kota Sdn Bhd* [2023] 1 MLJ 487; [2022] 10 CLJ 231 (CA) where the Court of Appeal reiterated the trite legal position in regard to rulings made at G an earlier stage of the legal proceedings. At paras [51] and [52], the Court of Appeal said:

> [51] For completeness, on the issue of res judicata and/or issue estoppel raised by D4, it would be instructive to refer to the judgment in the landmark case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] H 2 MLJ 57, at pp 113–114 (CLJ); pp 65–66 (MLJ) (Court of Appeal).
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> ... Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the court and on all parties to the suit until its reversal on appeal. In our judgment the decision of the learned judge overruling the respondent's preliminary objection rendered the point taken I res judicata.
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> ...
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> We cannot over emphasise the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly ...

[52] We have also noted the trite principle that the doctrine of *res judicata* also applies as between different stages in the same litigation (see *Government of Malaysia v Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74 at p 76).

[20] We shall turn now to Suit 623. The bank's last witness DW7 gave evidence on 17 July 2019. The bank's solicitors filed their written submissions on 23 July 2019 whereas the plaintiffs' counsel filed his submissions on 22 July 2019. The parties were directed to file written submissions of no more than 15 pages. There was an oral clarification on 23 July 2019. The judge delivered her decision on 29 July 2019.

[21] In so far as the claim is concerned, the judge condensed the allegations as appearing in paras [10]–[15] of the grounds of judgment.

10. The plaintiff's claim against the defendant arose consequent upon a press conference held by one Rafizi bin Ramli ('Rafizi')

11. The plaintiffs alleged that Rafizi had made statements concerning the banking information of the plaintiffs ('the plaintiffs' banking information) and had distributed the same at a press conference on 7 March 2012 ('Rafizi's press conference').

12. Hence on 22 May 2012, the plaintiffs filed this suit against the defendant vide a writ of summons dated 22 May 2012 to claim for general damage of RM560 million for breach of the provisions of the Banking and Financial Institutions Act 1989 (Act 372) ('BAFIA'), breach of fiduciary duty, and breach of contract to keep the banking information confidential.

13. The plaintiffs claimed that the sum of RM560 million is for the loss and damage suffered by them arising out of the wrongful disclosure of the plaintiffs' banking information by the bank.

14. The alleged documents containing the confidential information were annexed to the statement of claim as Annexures A to E.

15. The plaintiffs alleged that Annexures A to E were relled upon by Rafizi as evidence of wrongdoings by the plaintiff and set out in a press release distributed to the media at Rafizi's press conference.

[22] It is pertinent to note that the plaintiffs' complaint is that the confidential information in *lampiran* A-E are the information of the plaintiffs' banking dealings stored electronically in the bank's computer system known as the IBM mainframe. In short, the confidential information is information that is exclusively from and under the control of the bank.

[23] It is pertinent to mention here that during cross-examination, Fam admitted that the information in A-D is from the bank. The information at *lampiran* A-D is information relating to, inter alia, the balance summaries of accounts held by the P1, P2, P3 and P5 with the bank. This confidential information is stored electronically in the bank's IBM mainframe and is known

as the CP-BS. According to the plaintiffs, the judge had failed to judiciously consider that even the loan application by the plaintiffs, which is Annexure E (the plaintiffs' internal loan document in the bank's keeping) had been disclosed by the bank to the public. This is because the information at *lampiran* E is also information stored electronically in the bank's IBM mainframe, and relates to properties intended to be used as security to finance the acquisition of eight properties at KL Eco City, and which were the subject matter of a loan offer from the bank to P5.

THE BANK'S DUTY OF CONFIDENTIALITY

[24] It is trite that there is a duty of confidentiality that is owed by the bank towards the plaintiffs and this is a basic and fundamental aspect of a banker and customer relationship. The duty is commonly known as the bank's implied contractual duty. This brings us to the case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA) ('Tournier'). In *Tournier*, the English Court of Appeal was unanimous in the view that the obligation of confidentiality was an implied term arising from the banker's contract with the customer.

[25] However, Their Lordships differed as to the scope of this duty. In *Tournier* the plaintiff sued the bank based on a cause of action for breach of an implied contract that the defendant (bank) would not disclose to third persons the state of the plaintiff's account or any transactions relating thereto. It was contended for the plaintiff that for breach of an implied contract of secrecy, the obligation claimed was alleged to be an absolute obligation unqualified by any exceptions. It appeared that in the passbook issued by the defendant to their customer, including the passbook of the plaintiff, there was on the first page a statement that 'The officers of the Bank are bound to secrecy as regards the transactions of its customers'. Lord Justice Bankes summarised the facts (p 467) as follows:

> The plaintiff was a customer of the Finsbury Pavement branch of the defendant bank. In April, 1922, his account was overdrawn to a small amount, and on April 8 the plaintiff signed a document agreeing to pay off the debt by weekly instalment of 11. At the time this document was signed the plaintiff was about to enter the employ of a firm of Kenyon & Co, and on the document containing the agreement the plaintiff wrote their name and address. The plaintiff did not pay the weekly instalments as agreed.
>
> In July the acting manager of the branch, by name Fennell, got into telephonic communication with Kenyon & Co for the purpose of ascertaining the plaintiff's private address.
>
> The inquiry led to further conversation with two directors of the company, one of the name of Wells, and the other of the name of Kenyon. The plaintiff's complaint in the action was that in the course of the conversation on the telephone. Fennell had told Kenyon that the plaintiff's account was overdrawn, that various promises

made by him to give the matter his attention had not been fulfilled, that cheques which passed through his account were for betting men, and that the bank thought that he was betting heavily. To Wells Fennell was alleged to have said that he was afraid that the plaintiff was engaged with bookmakers, as the bank had been able to trace a cheque or cheques passing from the plaintiff's account to bookmakers.

The innuendo pleaded was that the words complained of meant and were under was that the words complained of meant and were understood to mean that the plaintiff was an undesirable person to be employed by Messrs Kenyon & Co, and a person not fit to conduct their business or to be entrusted with money. Wells and Kenyon were called as witnesses for the plaintiff, and they deposed to a conversation with Fennel in the terms alleged in the statement of claim.

[26] At p 470, Bankes LJ said:

The case for the plaintiff as alleged in the statement of claim was that the bank were absolutely pledged to secrecy in regard to the plaintiff's account and business, and all matters incidental thereto, and that it was an implied term of the contract between the plaintiff and the bank that they would not disclose to any one any of the plaintiff's business with the bank or matters arising therefrom, or the nature or state of his account, or any transactions relating thereto. The learned judge very properly, in my opinion, ruled against the existence of any such absolute contract.

[27] At p 471, the legal position at common law was clearly established that there is 'no absolute contract' that the customers confidential information will never be disclosed under any circumstances. In this regard, Bankes LJ made the following legal propositions:

I hold, as a matter of law, that there is no such absolute contract as Sir Harold Smith has contended for between a banker and his customer. He has contended that there is an absolute contract that the banker shall not under any circumstances disclose the state of a customer's account to another person. I hold, as a matter of law, that there is no such absolute contract. But, if the banker has made that disclosure justifiably, that is to say, if, under the circumstances of the particular case, it was reasonable and proper that he should make the communication, then there is no breach of contract on his part'. With all respect to the learned judge that this is not a sufficient explanation of what is a difficult and hitherto only very partially investigate branch of the law.

...

At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is classify the qualification, and to indicate its limits.

[28] At any rate, at p 474, Bankes LJ emphasised the marked nature of the relationship between a banker and its customer. He said:

The case of the banker and his customer appears to me to be one in which *the confidential relationship between the parties is very marked. The credit of the customer*

depends very largely upon the strict observance of that confidence. (Emphasis added.)

[29] The English Court of Appeal in *Tournier* opined that the trial judge erred in failing to direct 'the jury of the nature and limits its qualifications of the duty of the bank as a matter of law, leaving to them only questions for the purpose of ascertaining their view whether the communication complained of was or was not made, and whether it did or did not come within any or the protected occasions to which I have called attention'. Scrutton LJ agreed with Bankes LJ and said (p 479):

> The other cause of action is of far more public interest. The plaintiff alleged an absolute contract to be implied that the bank should not disclose the plaintiff's account or matters arising therefrom, or any transactions relating thereto, to anybody. The judge directed the jury there was no such absolute contract, and I think he was right.

[30] At p 480, Scrutton LJ said:

> The court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. Applying this principle to such knowledge of life as a judge is allowed to have, *I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in circumstances*. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient.

[31] Thus, both Bankes LJ and Atkin LJ were of the view that this duty is not confined to information derived from the customer's accounts itself but also to information derived from sources other than the customer's actual account, as long as the information arose out of the banker and customer relationship. Scrutton LJ however, did not think that this duty would apply to knowledge derived from sources other than from the customer or his/her account.

[32] Further, His Lordship also thought that this duty is inapplicable to knowledge which the bank acquired before the banker and customer relationship was contemplated or after it has ceased. Atkin LJ also did not extend this duty to information obtained after the customer ceased to be a customer. As to the duration of this duty, it continues even after the customer ceases to be a customer of the bank. Clearly, *Tournier* was a landmark case which laid down and defined the scope of a banker's duty of secrecy and confidentiality to its customer.

[33] In *Wong Yeng Mun v CIMB Bank Berhad* [2010] MLJU 414; [2011] 1 CLJ 785 (HC), Justice Balia Wahi Yusof (later FCJ) referred to *Tournier*'s case and held at p 795 of the judgment 'it is implied in a contract between a banker and his customer that the banker will not divulge to third persons, without the

consent of the customer express or implied, either the state of the customer's account, or any of his transaction with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by a court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it'.

[34] Returning to the present appeal, in applying the principles that can be distilled from *Tournier*, it was argued for the plaintiffs that the bank, through the employee, Johari, had illegally obtained or extracted the confidential information because Cheam had unlawfully granted Johari access to restricted areas of the bank's IBM mainframe, including, inter alia, the CP-BS and this enabled Johari to unlawfully disclose the plaintiffs' banking information to third parties and which found its way to Rafizi.

[35] Counsel for the plaintiffs argued that the judge had erred in fact and/or in law in failing to consider that Johari was able to access and obtain the confidential information because of Cheam's conduct in granting him access to restricted areas of the bank's IBM mainframe, including, the CP-BS. Therefore, it was submitted that the plaintiffs had a legal right and were entitled to expect that their banking information (including CP-BS) which was stored, maintained or kept by the bank in their computer system, will be secure and kept confidential at all times.

THE CONTRACTUAL DUTY OF THE BANK

[36] The contractual duty implied by the common law applies to banking institutions in Malaysia by virtue of ss 3 and 5 of the Civil Law Act 1956. Section 3 provides generally for the reception of the common law in Malaysia. While s 5 provides for the application of English law in all questions or issues which arise with respect to commercial law, inter alia, the law of banking.

[37] Besides a contractual duty, the bank as a banking institution is also under a statutory duty of secrecy and confidentiality imposed by the Banking and Financial Institutions Act 1989 ('the BAFIA'). The BAFIA has since been repealed and replaced by the Financial Services Act 2013 ('the FSA').

[38] Counsel for the bank concedes that there is an implied contractual duty on the part of the bank to keep the plaintiffs' banking information confidential. It follows naturally that the implied contractual duty does not only apply to the plaintiffs' account transactions, but it also includes all the information that the bank has which pertains to the plaintiffs as their customers.

[39] Thus the issue is whether the bank has wrongfully disclosed the confidential information in respect of the plaintiffs' banking information and

therefore breached their contractual duty towards the plaintiffs. It is necessary to state here that confidentiality is equivalent to secrecy or the state of having the dissemination of certain information restricted.

[40] In *Saltman Engineering Co Ltd and Others v Campbell Engineering Co Ltd* [1963] 3 All ER 413 Lord Greene MR defined confidential information in the following terms:

> The information, to be confidential, must apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[41] Thus, for information to be confidential it must have the necessary quality of confidence. As for the cause of action for breach of confidence, the necessary elements were identified in the case of *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157; [2008] 4 CLJ 217 (CA) where Sulaiman Daud JCA referred to the case of *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, and stated that three elements must be established in order to succeed in an action for breach of confidence, namely:

(a) the information sought to be protected has the necessary quality of confidence;

(b) the information was communicated in circumstances importing an obligation of confidence; and

(c) there must be an unauthorised use of that information to the detriment of the party communicating it.

[42] Insofar as the contractual duty is concerned, there is no dispute that there is an implied term in the contractual relationship between the plaintiffs and the bank that information relating to the plaintiffs' banking details (CP-BS) will remain confidential and will not be disclosed to unauthorised persons. This is trite and is plain commercial and common sense. This is because confidentiality is the cornerstone of all banking business. The confidentiality is necessary to give confidence to customers in entrusting their banking business to financial institutions.

[43] Thus, pursuant to the BAFIA (the FSA) the bank as a financial institution owed a duty of secrecy over their customers' banking information. Indeed, if such a duty into a banking contract is not implied, then that would

be repugnant to the statutory protection of customers' banking information. Thus, the need to imply such a term is both obvious, imperative and necessary.

THE TRIAL

[44] At the trial, the plaintiffs called three witnesses, namely:

(a) Dato' Sri Mohamad Salleh bin Ismail (P5) (PW1);

(b) Yusuf bin Abd Alim ('Yusuf Alim'), who was the Public Relations Consultant appointed by the plaintiffs (PW2); and

(c) Zakaria bin Mohammad, who was the financial expert appointed by the plaintiffs (PW3).

[45] The bank called seven witnesses, namely:

(a) ACP Tuan Fazlisyam bin Abd Majid — Ketua Jabatan Siasatan Jenayah Komersial Selangor (DW1);

(b) Veronica Foo ('Foo') — Head of the Investigation Audit Section of Internal Audit Division (DW2);

(c) Fam Yoke Fon ('Fam') — General Manager of the Information Technology Division (DW3);

(d) Cheam Chen Hooi ('Cheam') — Assistant Manager of Jalan Raja Laut Branch (DW4);

(e) Ng Poh Lyn ('Ng') — General Manager of the Human Capital Management (DW5);

(f) Lim Yoong Leng, General Manager of the Banking Operations Division (DW6); and

(g) Mr Tan Shien Doon — Chief Compliance Officer (DW7).

THE HIGH COURT — DECISION

[46] On the issue of whether the bank was liable for the alleged breach of the BAFIA provision, the judge held that a breach of s 97(1) of the BAFIA did not expose the bank to any statutory liability. At paras [38]–[39] the judge opined as follows:

> 38. I agreed with Mdm Yoong Sin Min ('Mdm Yoong'), the learned lead counsel for the defendant, that the plaintiffs are precluded from relying on the BAFIA to establish liability of the defendant within a civil claim for the tort of breach of statutory duty as s 97 of the BAFIA is a prohibition against an individual and the defendant is not an individual (see *Tan Eng Seong v Malayan Banking Berhad* [1997] 2 CLJ Supp 552, 568 and 583) (BOA), Tab 4).

39. In any event, Bank Negara Malaysia did not at any point in time take any action against the defendant under the BAFIA.

[47] On the issue whether the bank owed any fiduciary duty to the plaintiffs and if so, whether there was a breach thereof the judge held at paras [45]–[47] as follows:

45. I agreed with Mdm Yong that the defendant did not owe the plaintiffs a fiduciary duty as the relationship between the plaintiff and the defendant was that of creditor and debtor.

46. This is because it is undisputed that the banking transactions in the instant case involved only deposites and loans (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, 202–203 (BOA, Tab 5), *Klan Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283, 301–302 (BOA, Tab 6), *Aseambankers Malaysia Berhad & 3 Ors v Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773 ('Aseambankers'), 881–882 (BOA, Tab 7), and the decision of the English House of Lords in *Foley v Hill and Others* [1843-60] All ER Rep 16 (DBOA, Tab 8).

47. In *Aseambankers*, at p 882, the Court of Appeal held as follows:

(1) Traditional banking facility where customers deposit the monies with the bank ... (2) Financial and advisory services where the bank is appointed by the customer to be the customer's adviser on matters relating to financial and advisory services ... (3) Financial facility where the bank provides loan ... From the above 3 scenarios, only the seconds instance involves a fiduciary relationship between the bank and the customer, wjile in the first and third instances, the relationship between them is merely contractual, ie only as debtor and creditor, not fiduciary.

BREACH OF DUTY OF CONFIDENTIALITY

[48] On the main question/issue as to whether the bank had breached the contractual duty of confidentiality, the judge held that there was no breach of that duty. Simply put, the judge found that the bank was not at fault and not liable for what had transpired and the disclosure thereafter that was made at the press conference. The following paragraphs from the grounds of judgment explains the judge's reasons for arriving at her conclusion that the bank did not breach the implied term that the customer's banking information will remain confidential.

52. I noted that in its statement of defence, the defendant did not deny that it should hold the banking Information of its customer confidential.

53. Hence, I agreed with Mr Mathews that based on the banker-customer relationship between the defendant and the plaintiffs the defendant owed the plaintiffs an implied contractual duty of confidentiality (see *Tan Eng Seong v Malayan Banking Berhad* [1997] 2 CLJ Supp 552, 568 and 583) (BOA), Tab 4).

54. I also agreed with Mr Mathews that to not imply such a duty into a banking contract would be repugnant to the statutory protection of customers' banking Information.

55. The need to imply such a term is both obvious and necessary as it satisfies both the 'officious bystander' test and the 'business efficacy' test as set out in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 CLJ 503; *Jambatan Merah Sdn Bhd (In Liquidation) v Public Bank Bhd* [2016] 1 CLJ 811; *Wong Yeng Mun v CIMB Bank Bhd* [2011] 1 CLJ 785; and *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 481 ('Tournier'), which were referred to by Mr Mathews in support of his contention ...

56. However, I agreed with Mdm Yoong that since the contract between the plaintiffs and the defendant was that of a banker-customer service contract whereby the defendant agreed to supply banking services to the plaintiffs, there are qualifications to the Implied contractual duty of confidentiality, which the defendant owed the plaintiffs, as the liability of the defendant, if any, is not strict and it must be fault-based.

57. In support of her contention, Mdm Yoong had referred to 2 (two) authorities. The first is a book entitled *The Law of Contract*, GH Treitel (10th Ed), where at pp 780–781, the learned, author wrote as follows:

> Where the contract is one for the supply of services alone, liability is often based on fault ... All that such persons undertake is to perform the promised services with reasonable care and skill.

58. The second is the decision of the English Court of Appeal In *Target Holdings Ltd v Redferns* [1996] 1 AC 421, 432, House of Lords, and *Eyre v Messday* [1988] 1 All ER 488, 495, Court of Appeal.

59. Mr Mathews contended that the plaintiffs have no difficulty establishing that a breach of the implied contractual duty of confidentiality occurred as the plaintiffs' confidential banking information was wrongfully accessed, obtained and, subsequently, wrongfully disclosed to unauthorised third parties. He relied on the two following reasons:

(1) It cannot be denied that Johari accessed and obtained the plaintiffs' confidential banking Information without the plaintiffs' consent, and

(2) It is further undisputed that Johari could only have accessed and obtained it because DW4, Cheam Chen Hool ('Cheam') granted Johari access to restricted areas of the defendant's IBM mainframe, including, inter alia, the customer profile (CP) banking summary (BS).

60. Mr Mathews contended that s 97(1) of the BAFIA imposes a strict obligation on the defendant to keep banking information confidential.

61. Hence, he relied on s 97(1) of the BAFIA to submit that having established the existence of the implied contractual duty of confidentiality owed by the defendant to the plaintiffs and the plaintiff has established that there was wrongful disclosure of the plaintiffs' confidential banking Information, it is incumbent upon the defendant to prove by evidence, that the defendant ought to be exonerated from liability.

62. He also submitted that save and except where the defendant can establish that the statutory exemptions under s 97(2) of the BAFIA apply, the burden is on the defendant squarely to show that the breach which led to the wrongful disclosure was not on account of any wrongful act or omission on the defendant's part.

63. He referred to the decision of the House of Lords in *Nimmo v Alexander Cowan & Sons Ltd* [1987] AC 107, which was approved and followed in the subsequent Supreme Court decision of *Baker v Quantum Clothing Group Ltd (formerly Taymil Ltd)* [2011] UKSC 17 in support for his proposition.

64. He also submitted that, the defendant having admitted that it was Johari, the defendant's employee, who wrongfully accessed the CP-BS and printed out some Information on some pieces of paper and having admitted that the information disclosed by Rafizi was information concerning the plaintiffs' accounts stored in the defendant's IBM mainframe with the name of the defendant redacted, cannot exonerate itself by merely saying that it does not know how the plaintiffs' confidential banking Information accessed by Joharl ended up in Rafizi's hands.

65. He also submitted that the defendant's failure to provide evidence of exoneration invites liability.

66. He also submitted that it is not incumbent upon the plaintiffs to establish the causal link between Johari's wrongful accessing and printing of the plaintiffs' confidential banking Information and the subsequent disclosure of the same by Rafizi because this is an apt case for the application of the 'res ipsa loquitor principle (see *Md Sidek Salim & Anor v Roall Abu Hasan & Ors* [2018] 1 LNS 2106 ('Md Sidek')).

67. However, I rejected Mr Mathews' contentions and submissions that issue (3) ought to be answered in the affirmative.

68. Below are my reasons.

69. I noted that the plaintiffs' only complaint was that the defendant's system could have been such that only the defendant's particular staffer can sign on to his/her respective computer.

70. However, Fam Yoke Fong (DW3), the defendant's General Manager of the Information Technology Division, has said that work is not controlled based on work station, for professional efficacy purposes. DW3 also said that if work is controlled by one desktop computer, this is very rigid, archaic and is not a normal practice.

71. Lim Yoong Leng (DWB) testified that it was impractical.

72. On issue (3). I agreed with Mdm Yoong that the plaintiffs bear the burden to prove that the defendant has disclosed Annexures A-E to Rafizi (see ss 101, 102 and 103 of the Evidence Act 1950 (DBOA, Tab 1); the Court of Appeal's decision in *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627, 635, 838–839 (DBOA, Tab 13)).

73. However, I found that the plaintiffs have failed to discharge their burden of proof.

74. This is because the plaintiffs, through the fifth plaintiff's evidence, have conceded that the plaintiffs did not know for a fact whether it was the defendant who gave Annexures A-E to Rafizi:

YSM	Do you know for a fact that it was the Defendent bank who gave the documents to Encik Rafizi?
Salleh	No.
YSM	Personally, do you know as a fact that the bank or the bank's officer had handed any of these documents A to E to Encik Rafizi?
Salleh	No, I don't.

75. The plaintiff's witness, Yusuf Alim (PW3), who attended the press conference of 07. 03.2012, testified that Rafizi made no mention on how he obtained Annexures A-E:

PCH	Did Reffzi tell how he purportedly obtained these Annexures A to E?
Yusuf	In a specific, Yang Arif, no.

76. Hence, the court could not rule out the possibility that Rafizi could have been given the information for him to produce Annexures A-E from the plaintiffs' own personnel or officers.

77. During cross-examination, the fifth plaintiff testified that the plaintiffs' officer(s) had regularly requested for their banking documents/information to be delivered to them:

Salleh	Hashimah Ahmad.
YSM	Was she the only officer or other Finance Managers also dealt with the bank at the material time in 2012?
Salleh	She was the only one.
YSM	So are you saying that Puan, is It Puan Hashimah? Was the only person who dealt with the bank regarding the Plaintiffs' accounts and all the other 20 odd accounts? Was she the only one?
Salleh	As far as I know.
YSM	As far as I know most of them are on the phone. But the Bank Manager come and see us regularly, like almost every week.
Salleh	Alright. And in coming to see you, would he bring summaries and statements for your bank rather than for your Accounts Manager to go to the bank, does the bank come and give you summaries and statements of your accounts?
YSM	He does.
Salleh	Alright. So if we assume or rather since you have confirmed

A that that's how the bank deals with your company and your staff, how do you know for certain that It was not your staff who handed the annexures to Encik Refiz?

YSM I don't.

B 78. I also noted that the said Finance/Accounts Manager by the name of Hashimah bt Ahmad was initially one of the witnesses in the plaintiffs list of witnesses dated 29 October 2012.

79. However, in all probabilities, after realizing that the fifth plaintiff had given the aforesaid incriminating evidence on 8 December 2014, the plaintiffs decided not to C call her anymore, by removing her from their re-amended list of witnesses dated 20 November 2017.

80. The plaintiffs' financial consultant', Zakaria bin Mohammed (PW3) also said that the plaintiffs' officers were the ones who dealt regularly with the defendant on the plaintiffs' accounts.

D 81. Based on the evidence adduced by the parties' respective witnesses, I found as follows:

(1) there was no evidence adduced by the plaintiffs through their witnesses to prove that the defendant was responsible for disclosure of the plaintiffs E banking Information to Rafizi;

(2) the defendant's witnesses stated that they did not know who had disclosed the plaintiffs banking information to Rafizi;

(3) there was only evidence that Johari was seen printing out some Information on some pieces of paper by one of the defendant's witnesses F but the person who saw him doing that did not see whether the pleces of paper contained the plaintiffs banking information;

(4) none of the defendant's witnesses saw Johari giving the pieces of paper to anyone including Rafizi;

G

(5) at all material times, the defendant had performed its duty of confidentiality with reasonable care and aid by putting in place policies and procedures to safeguard the confidentiality of Its customers' information and transactions, Including the plaintiffs'; and

H

(6) the plaintiffs did not challenge the defendant's security system and policies save for one aspect, viz that Cheam signed on for. Johari's computer using Cheam's password and ID, and as such, the plaintiffs must be deemed to have accepted the same (see *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan* [2007] 7 MLJ 289, 307, Court of Appeal (BOA, Tab 12)).

I 82. I also noted that although the plaintiffs initially filed a list of witnesses with the names of the witnesses who the plaintiffs intended to call, including Rafizi and Johari, to prove their case against the defendant the plaintiffs, subsequently, changed their minds and informed the court that they did not wish to call both of them as their witnesses.

83. Pursuant to the beat evidence rule, the plaintiffs should have called Rafizi, who was a material witness, to testify on how he obtained Annexures A-E.

84. Again, the plaintiffs had earlier filed an application for leave to call Rafizi, which was allowed by this court on 9 January 2018. However, the plaintiffs subsequently decided not to call Rafizi.

85. Similarly, the plaintiffs should have also called Johari, who was a material witness, to testify on whether he was the one who gave the plaintiffs' confidential information to Rafizi. However, Johari was also not called by the plaintiffs to testify on this issue.

86. Hence, In this regard, I drew an adverse inference under s 114(g) of the Evidence Act 1950 against the plaintiffs in respect of their failure to call Hashimah bt Ahmad, Rafizi and Johari, who were material witnesses to the plaintiffs' case (see *Chan Yoke Lain (Administrator of the Estate of Chong Yoke Fah, deceased) v Pacific and Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303, 308 (BOA, Tab 14); and *Chal Hoon Seong v Wong Mang Heong* [2010] 8 MLJ 104, 112 (BOA, Tab 15)).

87. More importantly, I noted that the defendant through several of its witnesses testified in their examination-in-chief that Annexures A-E are not the defendant's documents.

88. For example, Veronica Foo (DW2), the defendant's Head of the Investigation Audit Section of Internal Audit Division had referred to Annexure A as an example and compared it with the defendant bank's own print out and pointed out numerous differences between them.

89. The defendant did acknowledge that its ex-staffer, Johari, had accessed and printed out information (from the CP-BS) from the restricted part of the defendant's computer.

90. However, based on the evidence adduced by the defendant through the defendant's witnesses, I found that Johari's action was clearly unauthorised by the defendant as his position as a clerk did not allow him to access the CP-BS.

91. Hence, I was of the view that the defendant is not liable to the plaintiffs for Johari's unauthorised actions (see Privy Council decisions in *Goh Choon Seng v Lee Kim Soo* [1925] AC 550, 554 (BOA, Tab 17), *Canadian Pacific Railway Company v Lockhart* [1942] AC 591, 800 (BOA, Tab 18); *General Engineering Services Ltd v Kingston and Saint Andrew Corp* [1988] 3 All ER 887 (BOA, Tab 18) and *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 1 MLJ 191 (BOA, Tab 20)).

92. I was of this view even though there was evidence that it was Cheam (DW4), who signed on for Johari to access the CP-BS. This is because the defendant has established that Cheam was not authorised to do this and Cheam acknowledged that he knew this was unauthorised.

93. Cheam (DW4) testified that he did not give his password to Johari, and he also testified that he did not authorise Johari to access the plaintiffs' CP-BS.

94. I further noted that Cheam (DW4) testified that after signing on for Johari, he had continued to monitor Johari and the reason for signing on for Johari was due to Cheam's (DW4's) heavy workload and that he trusted Johari, who had been working for the defendant since 1995.

95. I found Cheam (DW4) and the rest of the defendant's witnesses to be credible witnesses.

96. Hence, all that can be proven by the plaintiffs is that Johari had wrongfully accessed prohibited parts of the defendant's computer system.

97. The plaintiff failed to prove that it was Johari who had disclosed the information in Annexures A-E to Rafizi.

98. Hence, the plaintiffs have failed to prove that it was the defendant who gave Annexures A-E to Rafizi.

99. Without such proof, the defendant cannot be held liable to the plaintiffs.

100. Therefore, I held that the defendant has performed its implied contractual duty of confidentiality with reasonable care and skill and that the defendant cannot be held vicariously liable for the aforesaid unauthorised acts of Johari.

101. Be that as it may, even if I were to find that the defendant has disclosed information, (which is denied by the defendant), the implied duty of confidentiality, is not an absolute one as it is subject to exceptions (see the common law exceptions in *Tournier*, 472–473, 486 (BOA, Tab 22) and the statutory exceptions in s 97(2) of the BAFIA).

102. Based on the contents of Annexures A-D, I found that they were summaries which do not relate to the plaintiffs/defendant.

103. In regard to Annexure E (see Bundle B2-1 pp 73–80) it was an agreed fact that it did not refer to any of the plaintiffs or the defendant.

104. In regard to Annexures A-D, it cannot be disputed that these documents do not contain any information relating to the defendant.

105. In other words, the name 'Public Bank Berhad' was not stated anywhere in Annexures A-D. In fact, during the purported press conference on 7 March 2012, Rafizi gave the following statements in respect of Annexures A-D (see: Bundle B2-1 p 82):

> para 5 — Semakan dengan sebuah bank tempatan, saya tak nak sebut bank sebab itu saya ada padamkan kod-kod bank. Kalau saya tak padamkan nanti orang tau bank mana

106. Even the plaintiffs themselves have pleaded in para 13 of the re-amended statement of claim, regarding Annexures A-D as follows:

> ... Wherein important information relating to the Plaintiffs, the Defendant their employees had been 'blacked out' ...

107. The plaintiffs' second witness, Yusuf Alim (PW2), also confirmed that during Rafizi's press conference of 7 March 2012, there was no reference to the defendant at all.

108. I also found that Annexure E does not contain information relating to the defendant.

109. Be that as it may, I was of the view that the disclosure of the information falls within the statutory exception in s 97(2) of the BAFIA, which permits such

disclosure by a bank officer, and, consequently, the defendant cannot be held liable for such disclosure.

110. It was established during the trial that the monies in the accounts of the first, second, third, and fifth plaintiffs came from the government loan of RM250m ('the government soft loan of RM250m').

111. The defendant stated through Lim Yoong Leng's (DW6's) witness statement (D32) Q&A13 and Q&14 that the information contained in Annexures A and B was already available in the public domain prior to Rafizi's press conferences on 7 March 2012.

112. The defendant relied on the news reports on the plaintiffs' alleged 'mishandling of NFC's finances including misappropriation of the RM250m soft loan' in support of its contention that the information contained in Annexures A and B was already available in the public domain prior to Rafizi's press conference of 7 March 2012.

113. This fact was admitted by the fifth plaintiff during cross-examination as follows:

YSM	This issue about how the government loan was used or misused was in fact discussed in the public or put into the public domain even before the 7.3.2012 press conference. Do you agree?
Salleh	It was mentioned. It was stated.

114. The large sums of RM71,395,617.91 and RM90,973.33 in Annexure A and the sum of RM1,872,254.98 in Annexure B ('the loan monies') were part of the said soft loan of RM250m.

115. Based on the evidence of Lim Yoong Leng (DW6), which was corroborated by the news reports, I found that the defendant has established that there were already public discussions about the loan monies prior to Rafizi's press conference of 7 March 2012.

116. Hence, the exception under s 97(2) of the BAFIA is applicable to the facts and circumstances of the instant case and the defendant cannot be held liable to the plaintiffs (see also: *Attorney-General v Observer Ltd and others* [1990] 1 AC 109, 268 (BOA, TAB 21), House of Lords (BOA, Tab 18 p 235)).

117. That Rafizi choose to use such information, which is completely innocuous by itself, to spin a story at the press conference, is not the defendant's doing.

118. At the material time, in view of the investigations into the plaintiffs' alleged misuse of the government's soft loan of RM 250 million, and the undisputed fact that their accounts have been frozen by the police, there may be a duty to the public for information relating thereto to be reported to the public (see *Tournier* (BOA, Tab 22); and *Pharaon and others v Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) Intervening)* [1998] 4 All ER 455, 463–464 (BOA, Tab 23)).

119. It is also an undisputed fact that, ultimately, the monies in the first and fourth plaintiffs' accounts were seized by the police, under the Anti-Money Laundering,

Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'). This itself is indicative of an offence committed by the first and fourth plaintiffs.

120. Further, the implied duty of confidentially is not absolute and there are exceptions as seen in s 97(2) of the BAFIA and common law. As such, the plaintiffs have failed to prove that the defendant can be made liable to them.

OUR ANALYSIS AND DECISION

[49] The starting point is that the bank does not deny that it is an implied term of the contract between banker and customer that the bank will maintain confidentiality over the customers' banking information. In this context it is perhaps relevant to mention that the bank's own client charter states, 'We highly respect and thoroughly appreciate your concerns on the privacy and security of all personal information and financial transactions handled by us. We will employ the tightest security architecture to prevent unauthorised access and ensure your peace of mind concerning all your transactions with us. We will pursue the strongest from of preventive and punitive measures against any party which attempts to compromise your right to transaction security and confidentiality'.

[50] The judge agreed with the submissions that were made on behalf of the bank that a breach of the implied term or duty does not expose the bank to liability as it is 'fault based'. Essentially, the judge exonerated the bank for the (mis)conduct of Cheam in enabling Johari to have access to the bank's IBM mainframe and for the latter's surreptitious conduct in accessing the system and in downloading the plaintiffs' CP-BS and printing the same and giving it to third parties.

Foo's testimony at the trial

[51] Foo was the bank's Head of the Investigation Audit Section of Internal Audit Division. In examination-in-chief (per her witness statement), she was referred to P5's complaint letter and she said:

(a) Yes. I have seen this letter, which was signed off by the 5th Plaintiff as Executive Chairman of the 1st Plaintiff ('the letter'). The Letter was received by the Defendant on 30.3.2012. Through the Letter, it was alleged that the Defendant had released information to the 1st. 2nd, 3rd and 5th Plaintiffs without their respective permission.

(b) Together with the Letter were a series of Annexures A to E, which are identical to the Annexures A to E shown in the Bundle of Pleadings ('BOP') pages 36–52. The contents in Annexures A to D look similar to the contents in the print-outs of extracts from the Customer Profile — Balance Summary; and the contents in Annexure E look similaro the

contents in the print-outs of extracts from the Collateral System. However, the Defendant does not know whether the Defendant's Customer profile-balance summary and the Defendant's Collateral System are the same as the said documents marked as Annexure A to E.

[52] In so far as the action that was taken, she said that:

Upon receiving the Letter, the Defendant through its Audit Division immediately conducted investigations into the matter. The Audit Division also engaged the assistance of the Information Technology Division of the Defendant throughout the course of its investigations. The contents in the Annexures A to E appeared to be similar to the contents in the print-outs of information stored in the computer system of the Defendant and hence, the Information Technology Division's assistance was required to ascertain how information from the Customer profile-balance summary and/or the Collateral System was retrieved by whom.

[53] In so far as the information technology findings were concerned, Foo said:

With regard to the Customer Profile — Balance Summary, the Information Technology Division managed to ascertain the source from which the said Customer Profile — Balance Summary were printed out from. With regard to the Collateral System, the Information Technology Diversion could not ascertain the source, for the reasons as explained by my colleague, Ms Fam.

[54] She then explained at length regarding the investigations conducted by the Audit Division on the CP-BS. Foo said:

At the outset, I repeat my Q&A3 above. First, we looked at the 1st, 2nd, 3rd and 5th Plaintiff's Customer profile-balance summary. The contents in the print-outs of extracts from these Customer profile-balance summary look similar to the contents in Annexures A to D seen at the Bundle of Pleadings ('BOP') pages 36–43. For the purpose of explaining our investigations. I will make some references to the said Annexures A to D. Without admitting that the documents marked as Annexures A to D are the same as the as the Customer profile-balance summary (emphasis added). The information that we picked up from the Annexures A to D is as follows:

(i) Each Annexure A to D has the heading of 'Customer Profile-Balance Summary'.

(ii) Each Annexures A to D has its 'Customer Number' stated on the top left-hand corner. For instance, in Annexure D the Customer Number is '00006106660'

(iii) Each Annexure A to D has the date and time recorded at the top right-hand corner, which shows when the same was inquired by a staff. For instance, with regard to Annexure D, an inquiry was made on it on 16.2.2012 at 9:29:05am. I would like to explain further on what 'inquiry' means. The Defendant has a central computer ('IBM Mainframe Computer'), which electronically stores all of its customers' banking information and transaction, including the said 1st,

2nd, 3rd and 5th Plaintiffs' Customer profile-balance summary.

For instance, when a staff needs to view the 1st, 2nd, 3rd and 5th Plaintiffs' Customer profile-balance summary, that staff must first make an inquiry with the IBM Mainframe Computer, hat inquiry was recorded in the Customer Information Control System Log ('CICS Log').

(iv) Then, what that staff printed out the 1st, 2nd, 3rd and 5th Plaintiff's Customer profile-balance summary, the time when the same was printed out was recorded in a different system called the Branch Delivery System Log ('BDS Log'). The BDS Log records all activities performed by staff on the computers at the head office and also at all branches.

[55] She then explained that the bank's Information Technology Division conducted further investigations into the bank's computer systems, and managed to ascertain the source from which the plaintiffs' CP-BS were printed out. Her answer was as follows:

(i) With regard to the 5th Plaintiffs' Customer profile-balance summary an inquiry was made on 16.2.2012 at 9:29:05am, by using Cheam Chen Hooi's User ID ('Cheam's User ID') from Johari bin Mohamad ('Johari')'s computer at the Defendant Bank's Jinjang Branch, before the same was printed out.

(ii) With regard to the 3rd Plaintiffs' Customer profile-balance summary an inquiry was made on 16.2.2012 at 9:35:22a.m., by using Cheam's User ID from Johari's computer at the Defendant Bank's Jinjang Branch, before the same was printed out.

(iii) With regard to the 2nd Plaintiffs' Customer profile-balance summary an inquiry was made on 16.2.2012 at 9:37: 25a.m., by using Cheam's User ID from Johari's computer at the Defendant Bank's Jinjang Branch, before the same was printed out.

(iv) With regard to the 1st Plaintiffs' Customer profile-balance summary an inquiry was made on 16.2.2012 at 9:37: 42a.m., by using Cheam's User ID from Johari's computer at the Defendant Bank's Jinjang Branch, before the same was printed out.

(v) She also confirmed that the Bank's Information Technology Division also managed to ascertain the folllowing on 16 February 2012. Johari was logged on to his computer at the Defendant Bank's Jinjang Branch continuously from 8:47:28a.m to 12:41:28p.m. This was ascertained from the Windows Log, which records the time when staff log in and lo out of the Defendant Bank's computers. With regards to the said 1st, 2nd, 3rd and 5th Plaintiffs' Customer profile- balance summary, inquiries were made from Johari's computer between 9:29:05a.m. and 9:37:42a.m., before the same were printed out, which was within the said time period when Johari was still logged on to his computer.

[56] She said that the next focus of inquiry was to investigate why the plaintiffs' CP-BS were printed out from Johari's computer by using Cheam's user ID, instead of Johari's. She explained that Johari is a staff under the category 'clerk or teller'. The plaintiffs' CP-BS could only be accessed by authorised staff, ie: staff in the categories of 'officer', 'customer service representative' and 'managerial level'. She said that staff under the category of 'clerk or teller', which would apply to Johari, is not authorised to access the CP-BS. Thus, according to Foo, even though Johari was logged on to his computer at that material time, he was not authorised, being a clerk, to access into the CP-BS. Hence, the plaintiffs' CP-BS were printed out by using Cheam's user ID because Cheam being an officer was authorised to access the same. Foo testified that the bank's investigations revealed that Cheam had allowed Johari's computer, for the purpose of Johari to assist Cheam with some of his duties. She emphasised that this was most clearly unauthorised by the bank. Thus, Cheam's actions were themselves unauthorised by the bank and Cheam had committed misconduct.

[57] In so far as the 'printing' of the documents are concerned, Foo explained that the bank needed to ascertain who had printed out the plaintiffs' CP-BS at the relevant times of 9:29 am to 9:37 am on 16 February 2012. Hence, the investigation focused on ascertaining who was actually seated at Johari's computer during those times and she therefore examined the closed-circuit television (CCTV) recording at the Jinjang Branch for the day. She then made reference to the CCTV recording of the bank's Jinjang Branch on 16 February 2012 between 8:40 am and 10:33:29 am. The CCTV recording was then matched with the Windows log, CICS log and BDS log. She explained that there were a few seconds of difference between the electronic clocks in the CCTV recording, Windows log, CICS log and the BDS log.

[58] By matching the said CCTV recording with the Windows log, CICS log and BDS log, the bank managed to ascertain various details regarding the time when Johari logged on to his computer and when Cheam signed on his user ID on Johari's computer. The first inquiry for the plaintiff's CP-BS began at 9:29:05 am as per the CICS log and this was matched to the CCTV recording. Foo summarised the outcome of her investigations as follows:

> From the aforesaid investigations, we managed to confirm that:
>
> (i) It was Johari who was seated at Johari's computer at the aforesaid material times;
>
> (ii) It was Johari who used Cheam's User ID to print out extracts of information from the said 1st, 2nd, 3rd and 5th Plaintiff's Customer profile-balance summary, without the Defendant's authority and knowledge; and

(iii) When Johari left his seat empty-handed and returned to his seat with some papers in hand on two periods of time, ie: between 9:29:14 a.m. and 9:29: 30a.m; and between 9:37:41: a.m. and 9:38:01 a.m., he was likely to have gone from his seat to the printer the extracts of information from the said 1st, 2nd, 3rd and 5th Plaintiff's Customer profile-balance summary.

[59] Thus, as far as the bank was concerned, the culprit who conducted the searches on the various CP-BS (and printed the same) was Johari and he did it using Cheam's user ID. It may be mentioned here that Cheam did not share his user ID with Johari. Instead, what happened is that Cheam logged on to the system using his user ID while using Johari's computer and thus enabling Johari to have free access to the CP-BS.

[60] As for next steps she said:

> A: We then submitted our findings to the Defendant Bank's management and thereafter, on 2.5.2012, conducted a domestic inquiry. The Defendant concluded that Johari had done unauthorized acts in accessing and printing out information, which he had no authority or reason to access and to print out. Before the Defendant could take any disciplinary action against Johari, he tendered his resignation 2.5.2012.

[61] Foo's answer to the next question during the trial is rather perplexing. She was asked:

> Q: Did the *Bank* manage to ascertain whether it was Johari who allegedly disclosed any of the Plaintiff's Customer Profile — Balance Summary and/or the Collateral System to third party outside of the Defendant?
>
> No, the *Bank* could not ascertain whether it was Johari who allegedly disclosed any of the Plaintiff's Customer Profile- Balance Summary and/or the Collateral System to third party outside of the *Bank*. In fact, the *Bank* does not know and has no knowledge on how any of the Plaintiff's Customer Profile-Balance Summary and/or the Collateral System were allegedly disclosed to third party outside of the Bank.

[62] We say it is perplexing for the following reasons. Foo's testimony before the domestic inquiry was that Johari had committed misconduct by wrongly accessing the computer system and downloading and printing the plaintiffs' CP-BS (as per the charge of misconduct in the notice of domestic inquiry dated 24 April 2012). Foo was cross-examined by David Mathews ('DM'). The cross-examination touched on several aspects of the issues, particularly that which relates to disclosure to third parties. Her answer during cross-examination at the trial were as follows:

> Foo Guilty for unauthorized access and printing of documents.
>
> ...

DM .... the complaint was the allegation that the bank have release private and confidential information, correct? That is what it says here.

Foo This is what it is says, yes.

DM And from the charge, if you look at the next paragraph, you are hereby charge with, alright, contravention of section 97 of the banking and financial institutions act (BAFIA) 1989 and Bank Negara etc, ...

... last sentence thereby causing their information documentations revealed, divulged and provided to unauthorized third party sometime between 16.02.2012 and 7.03.2012 [inaudible 00.25.46], alright, so this was the charge that he was found guilty of, and the charge was not merely restricted to accessing confidential information it also pertaining to divulging this information to third party. You agree?

Foo No.

DM You disagree because you are saying that this finding at page 118 is incorrect?

Foo No. because I am not the maker on this charge, I don't know what was actually transpired.

DM Did you do any investigation on whether there was a wrongful disclosure of information to a third party?

Foo Yes.

DM And that investigation, what did you do?

Foo *We cannot find evidence that he had, he had disclosure any information.*

DM Because you asked him?

Foo From, even from the [inaudible 00.26.59] recording we cannot see. *There is no evidence to show that he had taken out what he had printed to give to anyone*.

DM Did he give any probable reason why he printed the documents?

Foo He was silent. He said he didn't took it.

DM So [inaudible 0.27.15] only inference that can be drawn looking at the meticulous timeline which you had identify in the various system and his act of going out immediately after pressing the print button going and retrieving it and come in to his desk and put it in to his drawer wouldn't the only inference be that he had printed out the material put it in his drawer and left taking that information putting in that envelope?

Foo *I didn't see it, that the document is stapled and put in his drawer is the document that he had printed. So, is not right for me to say that he has*

taken it out. I really cannot see what he took out.

DM I accept you couldn't see. My question is isn't it the only reasonable inference if you disagree you can say you disagree.

Foo I disagree.

DM Very well. So, [inaudible 00.28.13] why did you think that Johari printed out this document.

Foo I wouldn't know.

DM And you won't really concern to find out further, correct?

Foo It is not that, I don't agree with you.

...

DM Yes. You said here, I would also like to say that the said Annexures A to E are not the Defendant Bank's document, correct?

Foo Yes.

DM Alright. Now can you got to your main witness statement, D24, alright, the last sentence to question, sorry answer, the last answer 3b, the last sentence however the defendant does not know whether the defendant's customer profile-balance summary and the defendant's collateral system are the same as the said documents marked as annexures A to E.

...

DM Yes.

...

DM Yes. May Lady. I am obliged. Last sentence, however the defendant does not know whether the defendant's customer profile-balance summary and the defendant's collateral system are the same as the said documents marked as annexures A to E. now, [sic] first here when you say the defendant, you are speaking on behalf the bank right?

Foo Yes.

DM Not just yourself.

Foo Yes.

DM Right, thank you. Now, I don't quite understand what you mean here, when you say that the defendant does not know whether the defendant's customer profile balance summary are the same as the same document marked A to E because subsequently in D25 your answer to question 3 you [inaudible 00.33.53] say that these are not the bank documents. Can you explain?

Foo Okay. Lampiran A to E that is on the bundle R, page 59 to 70, okay, these are not the bank documents because it is indicated Parti Keadilan Rakyat there and also there's a lot of those marking and notations. This is not the bank documents.

DM Alright. So then why do you say, can't you just say from the very beginning? Why do you say you do not know whether the balance customer profile balance summary and collateral system are the same as the documents A to E? it appears to a contradiction.

Foo It is not a contradiction.

DM Alright. Now, would you agree that the information contain in lampiran A to E, this information that is also contain in Public Bank customer profile balance summary and collateral system? I am not saying is identical, I am not saying is the same documents but I am saying the information there, this information which is contains in the bank records. Do you agree?

Foo Balance yes, date, time yes, account yes, name of customer and address yes. The information, okay, yes. But not all the information is there, some information is missing.

DM I didn't say whether missing, just answer my question. What about the collateral system information page 63 to 70.

Foo As I recall, the information could be the same. As I recall.

DM Are you aware that Public Bank offered Dato' Sri Salleh a personal loan to purchase the 8 properties referred to in this lampiran E?

Foo No.

DM You do not know. Now, *during the disciplinary, domestic inquiry, you never testified that the document, the information from A to E did not come from the bank, correct?*

Foo *No. I was not asked the question, so I did not say.*

DM Miss Foo, jus answer my question. Foo Okay.

...

DM You don't know, alright, Now, you will notice from the statement here, that there is nothing said here about wrongful disclosure to third party. Correct?

Foo Yes.

DM Why is that?

Foo Because we could not find any evidence.

DM You could not? Are you able to speak for the panel?

Foo I cannot speak for the panel but *my investigation did not show that there was, we could not find the evidence of disclosure.*

DM		So I am suggesting to you that this statement here is purely your statement based on what somebody told you, correct?
Foo		No, I don't agree.
DM		You are in no position to say this is the defendant's conclusion.
Foo		I don't agree.
DM		Because as I pointed out to you *the panel's findings at 118 of bundle R, read together with the charge would necessarily involve wrongful disclosure. You agree or disagree?*
Foo		*I don't agree.*
	...	
Foo		*My finding shows there is only unauthorized access of accessing and printing the documents.*
	...	
Foo		I disagree because *my finding shows only unauthorized access and printing from Johari. I have no evidence that he had taken out any documents from the bank.*
	...	
Foo		*... The thing on the disclosure, whether he took it out and disclose to third party okay, there is no evidence to it. So, I did put it inside my witness statement on that. Because I cannot give any positive answer to the bank. I have no positive finding on that.*

Show-cause

[63] Foo's evidence must necessarily be tested against the bank's contemporaneous conduct. In this regard, by a letter dated 12 April 2012, the bank wrote to Johari and alleged that he had committed misconduct and asked him for an explanation. The bank's letter to Johari reads as follows:

> It has been reported that you misconducted yourself in the following manner:
>
> Sometime between 9.25am and 9.45am on 16 February 2012, you had accessed the following customers' accounts without any authorization and performed balance inquiry, all loans inquiry, printing of customers' profile-balance summary and printing of customers' loan accounts:
>
> Customers'

Reference No		Name
1	00006106660	Mohamad Salleh bin Ismail
2	00011479424	Agroscience Industries Sdn Bhd
3	00013326680	National Meat and Livestock Corp Sdn Bhd
4	00012908892	National Feedlot Corp Sdn Bhd

You are hereby required to furnish a written explanation to account for the above and to show cause why stern disciplinary action should not be taken against you. Please submit your reply to undersigned by *16 April 2012*, failing which it shall be deemed that you have no explanation to offer and action shall be taken by Management accordingly.

Johari's reply

[64] Johari replied via letter dated 16 April 2012 where he denied having committed any misconduct. In his letter, Johari stated the following:

I refer to the above and your letter dated 12th April 2012. As you aware, Internal Audit (Veronica Foo) has conducted a long and aggressive interview with me on 4th of April 2012. I was not afforded an opportunity to consult my legal adviser despite seriousness investigation against me. The manner of my interview was harsh and shocking, but I have not made an issue of it for the sake of harmony and the bank's reputation. I have been a staff for more than sixteen years and the bank should have acted fairy toward me.

I understand I am already under BAFIA investigation. As you know under criminal investigations I have a right to remain silent. I am advised by my solicitors that anything I say could eventually be used against by investigators and prosecutors.

As such I am not able to say anything further except that I do not admit to the charge you have made against me.

I hope the management will not take this matter any further. I am an ordinary person and I do not wish to be a scapegoat in any political matter.

Notice of domestic inquiry

[65] On 24 April 2012, the bank issued a notice of domestic inquiry to Johari and he was charged with having committed misconduct, the details of which read as follows:

Notice of Domestic Inquiry

We refer to the audit investigation into the complaint lodged by the Bank's customer, Dato' Sri Dr. Mohamad Salleh bin Ismail against the Bank alleging that the Bank has released private and confidential bank documents information with regards to their accounts.

The audit investigation revealed that you are involved in the said allegation. The Bank is not satisfied with your explanation dated 16 April 2012 in respect of the allegation of misconduct preferred against you vin the Bank's show cause letter dated 12 April 2012 to you. You are hereby charged with:

Contravention of Section 97 of the Banking and Financial institution Act (BAFIA) 1989, Bank Negara Malaysia/GP7 Guidelines On Code Of Ethics (Part 1) Item 12: Confidentiality and the Public Bank Group Service Undertaking Item 3.5 signed by you on 17 July 1995 when:

Sometime between 9.25am and 9.45am on 16 February 2012, you had accessed the

Bank's System via the login at PC workstation JJGWSSCN002 to perform inquiry and printing of the Customer Profile-Balance Summary for the following customers thereby causing their information/document to be revealed, divulged and provided to unauthorized third party sometime between 16 February 2012 and 7 March 2012:

a) Dato' Sri Dr Mohammad Salleh bin Ismail;

b) Agroscience Industries Sdn Bhd;

c) National Meat and Livestock Corporation Sdn Bhd; and

d) National Feedlot Corporation Sdn Bhd

You are hereby required to attend an inquiry to show come why stern disciplinary action should not be taken against you. The details of the inquiry are as follow:

Date: 2 May 2012 (Wednesday) Time: 10.00am

Venue: Public Bank Berhad

Jinjang branch

3476&3477 Garden Street

Jinjang Utara

52000 Kuala Lumpur

You may be accompanied at the Domestic Inquiry by a member of the member of the Inter-Relation Committee of Jinjang Branch or any of the Bank's branches within the State, if so you wish.

At the Domestic Inquiry, you will be accorded full opportunity to conduct your defence by not only cross examining such witness as many be produced against you but also by explaining your own witnesses (if any). In this regard, kindly furnish the name (a) of the employees that you wish to produce as your witness during the Domestic Inquiry to the Manager of Jinjang Branch by 26 April 2012 to enable necessary arrangements to be made. You may also bring along with you any documents or evidence that may help you in your defence.

Should you fail to be present at the Domestic Inquiry at that time, date and place mentioned above, the Domestic Inquiry will proceed in your absence and you will be bound by the findings of the Domestic Inquiry.

You are advised that the Bank views the above charge of misconduct very seriously and should you be found guilty of the charges of misconduct made against you, you may be liable to severe disciplinary action, including the punishment of dismissal.

Kindly acknowledge receipt this letter by attaching your signature on the duplicate and returning the same. (Emphasis added.)

Fam's evidence

[66] We turn next to Fam's evidence. Fam's testimony was as follows. During cross-examination, DM put it quite unequivocally to her that the charges ie; domestic inquiry against Johari relate to *lampiran* A-D and she replied in the

affirmative. The notes of evidence in respect of this part of Fam's evidence reads as follows:

DM	Very well. Right do you agree that the reason you were asked to testify Is because the Information that was said to have been wrongfully disclosed to these two gentlemen that whose names I've read out came from Public Bank Bhd. That is why you were asked to testify. Correct? I will rephrase think about it for a minute. The Information listed 1 to 4 In the charges that I've read out relate to Lampiran A to D. Correct?
FAM	Correct.
DM	*And that Information relates to information from Public Bank's computer system. Correct?*
FAM	*Yes.*
DM	*Not some other bank.*
FAM	*Yes.*
DM	*And that is why you were asked to come and give evidence. Correct?*
FAM	Yes.
DM	Thank you. *Now Ms Fam you agree that the information In Lampiran A to E could only have come from Public Bank's IBM Mainframe?*
FAM	*Yes.*
DM	And *the Information in Public Bank's IBM Mainframe is unique to Public Bank and its customers. Correct?*
FAM	The information?
DM	Yes.
FAM	Document I'm not sure.
DM	I didn't ask you about the document, Ms Fam. Please don't get defensive. I'm wording my question as fairly as possible, alright. Now could you look at your witness statement D26 your main witness statement page 2 Question and Answer No 4 (a) and (b) which goes over to page 3 as well, right?
FAM	Yes.
DM	And *you would agree that the information In Lampiran A to E in your words appear similar to the electronic Information in the Defendant's bank computer system. Correct?*
FAM	*Yes.*
DM	Now would you agree that all customer information contained in the IBM Mainframe of Public Bank is protected under the provisions BAFIA?

FAM Yes.

DM There is no...can be no unauthorised disclosure. Correct? It's confidential Information. Correct?

FAM Yes.

The notes of the domestic inquiry

[67] The following parts of the domestic inquiry are in our view relevant to the issues at hand. Foo testified in the inquiry as 'W1'. She was the lead investigator in relation to the charges that were eventually preferred against Johari:

PO: I will read the charge in English.

We refer to *the audit investigation into the complaint lodged by the Bank's customer, Dato' Sri Dr. Mohamad Salleh bin Ismail against the Bank has released private and confidential bank alleging that the Bank documents/ information with regards to their accounts.*

The audit investigation revealed that you are involved in the said allegation. The Bank is not satisfied with your explanation dated 16 April 2012 in respect of the allegation of misconduct preferred against you via the Bank's show cause letter dated 12 April 2012 to you. You are hereby charged with:

Contravention of Section 97 of the Banking and Financial Institutions Act (BAFIA) 1989, Bank Negara Malaysia/GP7 (BNM/GP7) Guidelines On Code Of Ethics (Part (I Item 12: Confidentiality and the Public Bank Group Service Undertaking Item 3.5 signed by you on 17 July 1995 when:

Sometime between 9:25 am and 9:45 am on 16 February 2012, you had accessed the Bank's System via the login at PC workstation JJGWSSCN002 to perform inquiry and printing of the Customer Profile-Balance Summary for the following customers thereby causing their information/documents to be revealed, divulged and provided to unauthorized third party sometime between 16 February 2012 and 7 March 2012:

a) Dato' Sri Dr. Mohamad Salleh bin Ismail;

b) Agroscience Industries Sdn Bhd (AISB);

c) National Meat and Livestock Corporation Sdn Bhd (NMLC); and

d) National Feedlot Corporation Sdn Bhd (NFC)

Johari, faham charge?

DF: Yes.

...

PO: As Johari pleaded not guilty to the charge, the Bank will ask the Bank's witnesses to present the case.

Meanwhile, I will tender the complaint from the customer. (Tendered Exhibit 2 — Complaint From Customer, Dato' Sri Dr. Mohamad Salleh bin Ismail).

We will give the panel sometime to go through the complaint letter. (Panel read through the complaint letter).

I will summarise the complaint letter. This is a formal complaint lodged by Dato' Sri Dr. Mohamad Salleh bin Ismail against the Bank. This complaint contains also:

i) A complaint to BNM against Public Bank Berhad;

ii) A police report dated 30 March 2012;

iii) Press release firom Parti Keadilan Rakyat (PKR) dated 7 March 2012 attaching the following system printouts:

– Lampiran A : Customer Profile — Balance Summary for NFC dated 16 February 2012 at 9:37:42 am;

– Lampiran B : Customer Profile — Balance Summary for NMLC dated 16 February 2012 at 9:37:25 am;

– Lampiran C : Customer Profile — Balance Summary for AISB dated 16 February 2012 at 9:35:22 am;

– Lampiran D : Customer Profile — Balance Summary for Mohamad Salleh bin Ismail dated 16 February 2012 at 9:29:05 am.

There are also other printouts which are not relevant to our case today.

Arising from this, the Internal Audit Division commenced their investigation. We will call in the auditor shortly.

We also issued a show cause letter dated 12 April 2012 to Johari.

(Tendered Exhibit 3 — Show Cause Letter dated 12 April 2012 issued by Human Resource Division).

Johari confirm terima surat ini and that is your signature?

...

PO: I will call in my first witness, Mr Veronica Foo from Internal Audit Division.

Witness 1 — Ms Veronica Foo (W1)

PO: For the records, please state your name and designation.

W1: Veronica Foo, Head of Audit Investigation and Compliance, Internal Audit Division.

PO: After the Bank received the complaint from Dato' Sri Dr. Mohamad Salleh bin Ismail, an investigation was commenced?

WI: Yes.

PO: Please tell us the scope and the findings of audit.

WI: On 30 March 2012, Internal Audit Division was informed that the Bank received a complaint letter from Dato' Sri Dr. Mohamad Salleh bin Ismail the Bxecutive Director of NFC that the Bank has released private and confidential documents pertaining to NFC, NMLC, AISB and Dato' Sri Dr. Mohamad Salleh bin Ismail

CM: The complaint was dated 30 March 2011 or 30 March 2012?

W1: Police report was dated 30 March 2012.

There is a typo error on the date of complaint letter by Dato' Sri Dr. Mohamad Salleh bin Ismail, should be 2012.

The complaint stated that the Bank has released the documents pertaining to the accounts without permission which is contravention of BAFIA. *In the said letter, NFC mentioned that on 7 March .2012, PKR had collectively organised for a news conference to release private and confidential documents where Dato' Sri Dr. Mohamad Salleh bin Ismail is the director of the 3 companies and the other is on his own personal account. Also provided were some documents as per Lampiran A to E (referring to Exhibit 2).*

Lampiran A to D (referring to Exhibit 2) are the printouts of the Cystomer Profile — Balance Summary dated 16 February 2012. Lampiran E shows collateral system printouts on 8 collateral numbers.

From here, audit started investigation. We looked at the time indicated on the right hand top of the Lampiran A to D (referring to Exhibit 2) and went in the System Log for Inquiry on Customer Profile under the Customer Information System made by all staff in the Bank between 9:00 am to 10:00 am. From the running of the System Log, we found out that User ID JJGBCCH matched the access on the four Customer Profile — Balance Summary as per Lampiran A to D (referring to Exhibit 2).

'JJG' is the abbreviation for Jinjang. 'B' is for Branch and CCH belonged to Cheam Chen Hooi (Cheam). From there, we zoomed into Jinjang Branch.

From the System Log, we then looked at the Login and Logout Audit Trail under the User ID JJGBCCH on 16 February 2012. From the Login and Logout Audit Trail, wve found that the login was done at the PC workstation JJGWSSCN002. 'WS' stands for workstation, 'SCN stands for scanner PC and '002' is the workstation number. We also found out that the PC workstation JIGWSSCN002 is located at the table of Johari bin Mohamed, a clerk of the Credit Department.

We further zoomed in the Branch Delivery System (BDS) Activity Log for User ID JJGBCCH on 16 February 2012. From the said Activity Log, it revealed all the activities performed. It showed that there were inquiries and printing of the Customer Profile - Balance Summary on NFC, NMLC, AISB and Dato' Sri Dr. Mohamad Salleh bin Ismail done at the PC workstation JJGWSSCN002 located at Johari's table between 9:29:06 am and 9:37:44 am.

Meanwhile, the System Log for Windows for 16 February 2012 showed that PC workstation JJGWSSCN002 was Logon using User ID JMO09698 which belonged to Johari from 8:47:28 am to 3:44:23 pm.

Based on that, we have identified that the Customer Profile — Balance Summary dated 16 February 2012 as per Lampiran A to E (referring to Exhibit 2) were performed using the User ID JIGBCCH and signed on at PC workstation JJGWSSCN002 which belonged to Johari. We then looked at the Digital Video Recording (DVR).

From the DVR, we saw that Cheam was walking to Johari's table to login at PC workstation JJGWSSCN002 at 9:27:33 am. At 9:27:38 am, he left Johari's table. This matches the Login and Logout Audit Trail under the User ID JJGBCCH.

We observed that the only person seated at the PC workstation JJGWSSCN002 for the whole period involving Lampiran A to D (referring to Exhibit 2) was Johari and his actions matched the BDS Activity log for the inquiries and printing.

We also saw that after the inquiries and printing, Johari got up and left the PC workstation JJGWSSCNO02 empty handed and walked away. Then, he was seen returning with some documents with him. The timing of him leaving the PC workstation JJGWSSCNO02 and returning with the papers in his hand matched the BDS Activity Log between 9:29:06 am and 9:37:44 am for 16 February 2012.

For example, the Lampiran D (referring to Exhibit 2) showed the time of 9:29:05 am at page 2 of the Customer Profile - Balance Summary for Dato' Sri Dr. Mohamad Salleh bin Ismail, Customer Number 00006106660. Based on the System Log, the BDS Activity audit trail showed that:

At 9:29:06 am, there was inquiry for Customer Balance Summary for number 00006106660.

At 9:29:10 am, there was Printing of 3270'. In 'Line 1 – Customer Profile — Balance Summary and Next Page 1'. In 'Line 2-16 February 2012 at 9:29:05 am'. The timing of 9:29:05 am matched what was indicated in Lampiran D (referring to Exhibit 2). Then, there was 'Line 3-Base 033 with Customer Number 00006106660'.

After that, at 9:29:17 am, the System Log shows 'Printing of 3270'. In 'Line 1 — Customer Profile Balance Summary and Next Page 2'. In 'Line 2 - 16 February 2012 at 9:29:05 am', In 'Line 3 — Base 033 with Customer Number 00006106660'.

From the DVR, at 9.29:14 am, Johari was seen leaving PC workstation JJGWSSCN002 empty handed, He was then seen returning to the same PC workstation with papers.

PO: For the panel's easy reference, I will tender the System Logs churned out by Information Technology Division [ITD])

(Tendered Exhibit 6 —

i) CICS log for 16 February 2012 between 9:28:53 am and 9:37:43 am.

ii) Branch Delivery System (BDS) Activity Log for 16 February 2012

between 8:58:00 am and 9:41:00 am

iii) BDS Log In and Log Out Activity Log for 16 February 2012 between 8:56;41 am and 6:32:19 pm.

iv) Sample screen of BDS on Customer Profile – Balance Summary.

For example, as per Lampiran D (referring to Exhibit 2), the signing on in the BDS System Log is the 1st highlighted item for inquiry. Next at 9:29:10 am, there is a print command. When you go across, you can see the time at 9:29:05 am. And all the way to the right, you can see 'Customer Number 00006106660'

You are saying that based on the BDS System Log, you have then viewed the DVR?

W1: Yes. There is slight difference in seconds between the BDS System Log and DVR timing. Besides that, we did see Johari stapling the papers and putting them into a plastic bag. This plastic bag was taken out from the Branch at day end.

PO: During the course of your investigation, are you able to eliminate other staff or source involved?

W1: We went through everything. Johari has used Cheam's User ID JJGBCCH. In my interview with Johari, I asked him, did he do it on instruction by a Public Bank staff or a former Public Bank staff or outsider. However, there was no answer from him and he was silent. He just said he did not do it.

PO: Let me recap.

Firstly, there was a whole Bank inquiry on the transactions performed between 9:00 am and 10:00 am on 16 February 2012. From there, you matched it to Jinjang Branch. Then, it was narrowed down to Cheam's User ID which was used at the PC workstation JJGWSSCN002 where Johari is seated. There is also the System Log for Windows where it showed that Johari logon at PC workstation JJGWSSCN002 between 8:47:28 am and logout at 3:44:23 pm under his User ID JMO09698. You then viewed the DVR between the window of time ie. 9:29 am to 9:45 am on 16 February 2012 and Johari was the only one using the PC. There were printing done and it matched the movements of Johari. It also matched the System Log.

WI: I also checked PC workstation JGWSSCNO02 belongs to who. It is assigned to Johari. He logon PC workstation JJGWSSCN002 using his User ID JMO09698.

PO: You understand what Veronica said?

DF: Yes

PO: Any disagreement on what was said by her?

DF: When I collect something. I do letters to customers and sometimes I collect letters or fax. Alan also asked me to take Standing Instruction. I bring back the letter.

PO: I will come to that part during the Q and A session later. From your observation, you are saying, the papers collected by you, may not be Customer Profile — Balance Summary?

DF: (Nodded).

PO: JMO09698, is it your User ID?

DF: Yes.

PO: Anything you would like to ask or clarify with Veronica?

DF: No.

PO: Panel, we will be viewing the DVR.

Does the panel want to view the DVR first or obtain testimony from ITD?

CM: Testimony from ITD first.

PO: OK, I will call in the next witness from ITD.

....

PO: ...

Veronica, where are these accounts maintained?

W1: In Jalan Hang Lekiu Branch except for 1 account under Dato' Sri Dr. Mohamad Salleh bin Ismail which is maintained at Kepong Branch.

PI: Not in Jinjang Branch? WI: No.

One is in Kepong Branch, that is not in the Lampiran. There 4 accounts in the Lampiran (referring to Exhibit 2) are maintained in Jalan Hang Lekiu Branch.

WI: There are 2 DVRs at the Branch and we will be watching the DVR 2 under Camera 8.

At 8:44:58 am: Cheam walks up from the back staircase.

PO: Johari, is that you seated at the workstation? DF: Looks like me. The camera can superimpose.

W1: At 8:44:58 am, we can identify Cheam through the shirt he is wearing.

PO: Johari, are you still not sure is not you?

DF: Could be me.

W1: I will fast forward to the next timing to view the time that Cheam walks over to Johari's workstation.

PO: What is he doing?

WI: Looks like keying in something and after that walks away.

At 9:27:25 am : Cheam is approaching Johari's workstation. This is the PC Workstation JJGWSSCN002

At 9:27-28 am : Cheam signing in and after that he left.

PO: So far, the DVR movements match the BDS 1og?

W1: Correct.

At 9:27:31 am : Cheam returned to Johari's workstation.

At 9.27:47 am : Johari's hand is on the mouse, scrolling.

At 9.27:52 am : Johari's hands are on the keyboard, You can see his hands movement that he is keying something and facing the PC workstation.

At 9:28:42 am : Johari is still working at his PC workstation.

Panel, we can see that no one else is at the PC workstation for this whole duration except Johari.

At 9.29:14 am : Johari is getting up and hands are empty.

At 9:29:28 am : Johari return to his PC workstation with paper.

PO: Johari, do you agree that you got up to retrieve some papers?

DF: Could be because long time ago, 2 months already.

PO: Just from what you see from the DVR?

DF: Yes, I collect something.

WI: At 9:30:12 am : Johari is keying something at the PC Workstation.

At 9:30:44 am : Johari is about to get up. His hands are empty.

At 9:31:01 am : Johari returns to his PC workstation with paper. When he is away, there is no one at his workstation. All these shows that he has log in into the loan inquiries on Dato' Sri Dr. Mohamad Salleh bin Ismail's loan accounts. He did not get up to collect the printout for every print that he did. He went to collect the printout in batch.

At 9:31:49 am : Johari gets up from his PC workstation with empty handed and walks away. This is the 3' time.

At 9.32:03 am : He returns with paper in his hand. Again, no' one is at his PC workstation, Only Johari is there, Thereafter, he is still doing inquiries and printing on these loan accounts. A couple of them.

PO: Is his inquiries and printing of these loan accounts related to Dato' Sri Dr. Mohamad Salleh bin Ismail?

W1: Yes.

At 9:33:15 am : He gets up again and walks away. At 9:33:39 am: He is back with some papers. A gain, no one is at his PC Workstation.

At 9.35:23 am : Johari's hands are on the keyboard and mouse. According to the BDS log, he was checking the Customer Profile — Balance Summary for AISB. Also in the BDS log, between 9:37:25 am and 9:37:42 am, he was looking at another accounts ie. NMIC and NFC and printed the Customer Profile — Balance Summary.

At 9:37:41 am : Johari left his PC Workstation. The printout is done at 9:37:44 am. There are a few seconds difference between the BDS and DVR.

At 9:38:91 am : He is back with several pieces of papers.

PO: *Throughout when Johari is performing inquiries, printing and retrieving of the printouts for Lampiran A to D (referring to Exhibit 2), there is no one at the PC Workstation.*

W1: Yes, only Johari was there at his PC Workstation JJGWSSCN002 using User ID JJGBCCH

PO: Earlier on, you mentioned that you could see Johari putting papers into an envelope?

W1: Yes, that is later. At this point, his activity is more of checking of loan accounts related to Dato' Sri Dr. Mohamad Salleh bin Ismail

At 9:38:25 am : Johari is still alone at his PC Workstation.

PO: Johari, do you agree that between the time Cheam sign in until now, you are the only one at this PC Workstation?

DF: Yes, based on camera, I could be the one there.

PO: When you step away, there is no one else. You agree?

DF: Yes.

PO: After Cheam sign in, be left and did not touch your PC Workstation, you agree?

DF: Yes, based on this DVR

W1: At 9:38:53 am : Johari is still the only one working at his PC Workstation. You can see in his hands, there are many sheets of papers

At 9:41:57 am : Johari's left hand is stretch out to take the stapler and then stapling the papers

At 9:42:02 am : Johari opens the drawer with left hand and appears to keeping the papers into his drawer.

PO: Confirm that your drawer is there, on your left?

DF: Yes.

PO: Panel, based on the BDS log, during the whole stretch, these 4 accounts and other related loans accounts were all that he inquired and printed, no other accounts. Based on the balance of probabilities, the papers that he stapled are the printouts of the 4 accounts.

At 9:44:59 am : Jaswinder came to Johari's PC Wotkstation. By the BDS log, it shows that he has already log out. All the accounts related to the complaint and Dato' Sri Dr. Mohamad Salleh bin Ismail were already completed.

W1: At 9:49:52 am : Johari puts the papers into his drawer. He was looking at a small paper and threw into the waste paper basket.

At 9:50:28 am : He was seen taking more papers. He opens his drawer and then stapling some papers and put into his drawer.

At 10.25:34 am : He takes out something firom his drawer.

PO: What is he taking out?

W1: Like plastic bag.

At 10:25:40 am : He puts the paper into the plastic bag.

At 10:25: 48 am : He keeps it in the drawer.

From the sequence, we can see that Cheam came to log in but the log out was done by Johari. Cheam did not come to 1og out. No password is required to log out.

P1: Did Johari see the whole continuous DVR?

WI: No, only now. I did offer to him on the day of interview. But he doesn't want.

We will view the next segment in the evening where Johari was preparing off.

At 5:47:21 am : Johari is bending to his drawer. He is taking out something

At 5:47:33 am : Johari stands up and with the envelope. More like a courier bag and is ready to go.

We will now look at Camera 14.

At 5:48:05 am : He left the Bank with the courier bag and papers. This is Johari walking.

That's all for the viewing.

...

PO: The Bank's charge did not say you meet or hand over the documents to them. In the Bank's charge, we say that Johari *telah menyebabkan documents telah diserahkan, dimaklumkan dan diberikan* ke unauthorised 3rd party. *You caused it because you are the one who printed the Customer Profile — Balance Summary*

...

PO: Panel, I will start first.

Members of the Panel, the Bank received a serious allegation of breach of confidentiality from one of our customers, Dato' Sri Dr. Mohamad Salleh bin Ismail, Executive Chairman of NFC and immediately commenced investigations to determine the validity of the allegations

Based on the documents furnished by the customer in the complaint, ie Lampiran A-D (referring to Exhibit 2) *which appeared to be printouts of the Bank's Customer Profile-Balance Inquiry dated 16 February 2012* for four accounts, namely, National Feedlot Corporation Sdn Bhd, National Meat and Livestock Corporation Sdn Bhd, Agroscience Industries Sdn Bhd and Dato' Sri Dr.

Mohamad Salleh bin Ismail, Internal Audit Division and Information Technology Division pet formed the following (Emphasis added):

A query on the system log mainframe for transaction between 9.00 am to 10:00 am on 16 February 2012, which showed that the times on the printouts matched the access by BDS ID JJGBCCH belonging to Mr Cheam Chen Hooi, a Senior Operations Officer of Jinjang Branch.

A summary of the transactions one while Mr Cheam's BDS ID was logged in between 9:27 am to 9:44 am showed exact match to the queries and print out of the complainant's 4 accounts.

The summary of Mr Cheam's log in and log out activities showed that from 9:27 am to 9:44 am, his ID was logged in to PC Workstation JIGWSSCNO02.

On 16 February 2012, the Windows User ID for PC Workstation JJWSSCN002 between 8:47 am and 3:44 pm was JMO09698 which belonged to the defendant

Viewing of the DVR showed that:

– Mr Cheam had walked over to defendant's workstation to sign on his BDS ID for defendant to use.

– Defendant was the only one who used the PC between 9:25 am to 9:45 am.

– Defendant's movements as seen on the DVR footage corresponds with the printing time on the support documents. He would transmit the inquiry command then the print command and walk away from his workstation empty-handed towards the direction of the printer. He would return momentarily with a piece of paper in his hand. That MOP, is the print out of the Customers' Profile Balance Summary.

The defendant himself agreed that:

– PC Workstation JIGWSSCN002 is his workstation and User ID JMO09698 belongs to him

– On 16 February 2012 between 9:25 am to 9:45 am he was the only one who used the said PC.

Members of the panel, the system log showed that the inquiry and printing of the affected documents were conducted from PC Workstation JJGWSSCN002 and-based on the above trail, it had to have been done by the defendant. Despite disagreeing with our findings, the defendant has not been able to furnish a single piece of evidence to dispute the evidence that has been tendered here today.

Members of the panel, the defendant had, without authorisation, performed inquiries and printing of the customers' accounts. These were not even customers of Jinjang Branch so he therefore had no official reasons or excuse to access the account, His action was personally motivated, He was the only one who had the printouts and they ended up in the custody of unauthorised third parties. By his conduct, he had caused these confidential documents to be revealed, divulged and provided to unauthorised third parties. And by his conduct, he had contravened Section 97 of

BAFIA 1989,BNM/GP7 Guidelines on Code of Ethics Item12 : Confidentiality and the Public Bank Group Service Undertaking Item 3.5 which he signed on 17 July 1995. (Emphasis added.)

Members of the panel, BAFIA, the BNM guidelines, the Bank's own Service Undertaking all place strong emphasis on preserving the confidentiality of customers' information, 'The customers emplace upon the bank a high degree of trust and in return expect absolute discretion on the Bank's part. In the book Misconduct in Employment by B.R. Ghaiye, it is stated that, 'The giving of unauthorised information relating to the affairs of the bank tantamount to an act subversive of discipline...' Under the BAFIA, anyone, convicted for breaching Section 97(1) may be sentenced to up to 3 years in jail or fined up to RM3m or both.

Members of the panel, what, the defendant has committed shakes the very foundation of trust emplaced by the customers on the Bank and in turn, the trust emplaced by the Bank on each and every employee. Members of the panel, *the Bank's evidence trail is clear and does not lie. We urge the panel to find him guilty of the charge.*

Members of the panel, what the defendant has committed shakes the very foundation of trust emplaced by the customers on the Bank and in turn, the trust emplaced by the Bank on each and every employee.

Members of the panel, the Bank's evidence trail is clear and does not lie. We urge the panel to find him guilty of the charge.

Johari, sekarang giliran kamu?

The domestic inquiry — Outcome

[68] The domestic inquiry panel found Johari guilty of the charge of misconduct. In their brief 'panel's findings' they said:

PANEL'S FINDINGS

The Panel unanimously found the Defendant guilty of the charge preferred against him based on the testimonies from the witnesses as well as the evidence adduced during the inquiry.

The Panel further commented that the evidence against the Defendant is complete with audit trails, system information and Digital Video Recording footage.

[69] However, the bank did not 'dismiss' Johari as he pre-emptively resigned on 2 May 2012. In his letter of resignation, he stated:

Re: Resignation

I refer to the above matter and are please to informed that I would like to tender my resignation one month with effect from the above mentioned dated.

All my Housing Loan I would like to convert as the normal customer loan.

I here take the opportunity very much thank you to the Bank's during my service for the past seventeen years.

Meanwhile, kindly acknowledge receipt of this letter.

[70] In this part of the judgment, we deal with each of the issues as they arose for consideration before the judge and as ventilated before us. To recapitulate, the plaintiffs' case against the Bank was predicated on a breach of s 97(1) of the BAFIA, breach of fiduciary duties and breach of contract, more specifically a breach of the bank's implied duty to maintain confidentiality and secrecy over the plaintiffs' banking details. We are not concerned here with any higher public interest purpose (duty to disclose) reasoning for the so-called expose by Rafizi of alleged wrong-doings by the plaintiffs and each of them. It is important to emphasise that, that is not a discussion which is relevant in these proceedings.

[71] Indeed, it is important to note that none of the plaintiffs, particularly P5 were found to have committed any wrong-doing, or found guilty of any financial crime. This is an issue which needs to be addressed and clarified as the Judge seemed to have formed the view (wrongly in our view) at paras [118]–[119] of her judgment that the mere fact that criminal charges were preferred against P5 is equivalent to his guilt. The judge's finding in this regard was a serious misdirection. It is trite law that an accused person is innocent until the ingredients of the charge are proven and is pronounced guilty by a court of competent jurisdiction. As such, until a guilty verdict is pronounced by a criminal court, it matters not one jot that the accused person may have been found guilty by the so-called court of public opinion via social media.

[72] Thus, as events turned out, P5 was acquitted of the criminal charges against him and the prosecution decided to withdraw their appeal against the acquittal. The judge fell into error in agreeing with the bank that the plaintiffs are not 'with clean hands' as they are facing criminal charges and are precluded from maintaining a claim against the bank for wrongful disclosure of their banking information.

[73] Next, the judge rejected the plaintiffs' claim based on a breach of s 97(1) of the BAFIA and breach of fiduciary duties. We have examined the judge's reason for her decision and are in agreement with her approach on these issues. Thus, it is clear that s 97 of the BAFIA is targeted at and criminalises the wrongful conduct of the individuals within the bank for breaching banking secrecy.

[74] However, the bank as an institution, does not seem to fall within the purview of s 97 of the BAFIA. That seems odd and is a lacuna. That has since

been corrected as s 133 of the FSA targets the individuals and the financial institution as well. That is only in so far as who are within the scope of the offence creating provision of BAFIA/FSA. We do not see s 97 of the BAFIA as providing the plaintiffs qua customers of the bank with a civil cause of action. We do not intend to belabour the point in so far as this part of the case is concerned.

[75] As for the claim based on breach fiduciary duties, again, we agree with the judge that upon an application of the principles that were discussed by the Court of Appeal in *Aseambankers*, there was no element of investment advisory work that was undertaken by the bank such as may perhaps place the bank in a fiduciary capacity vis a vis the plaintiffs.

[76] Ultimately, we see this case as one which turns on the question whether the bank had breached its implied contractual duty to maintain confidentiality over the plaintiffs' banking information. On this the parties are in agreement in that bank accepts that it is under a duty to maintain confidentiality over the customers banking information. The plaintiffs took comfort from the bank's client charter which reads as follows:

Privacy and Security

- We highly respect and thoroughly appreciate your concerns on the privacy and security of all personal information financial transactions handled by us.
- We will employ the tightest security architecture to prevent unauthorized access and ensure your peace of mind concerning all your transaction with us.
- We will pursue the strongest form of preventive and punitive measures against any party which attempts to compromise your right to transaction security and confidentially.

[77] We turn now to the heart of the dispute, ie the impugned documents. The important question is — were these the bank's documents? The plaintiffs case was framed and formulated on the basis that these were the bank's documents which concerns the plaintiffs' banking information.

[78] At the trial, the bank refused to acknowledge that the impugned documents, Annexure A, B, C, D and E were their documents. It is clear that the judge readily accepted the bank's disavowal of the impugned documents.

[79] As a result, the judge ruled paras [87]–[88] that the plaintiffs have not proven that the impugned documents are documents that came from or originated from the bank. The bank's witnesses especially Ms Foo and Ms Fam sought to portray that the impugned documents 'looked similar' to the bank's

CP-BS but were not prepared to vouch for the authenticity of the impugned documents. These two witnesses said that since the name Parti Keadilan Rakyat was imprinted at the top of the impugned documents, thus these are not the bank's documents. But Fam had also testified that the information therein came from the bank.

[80] If the judge was right in her ruling then that quite literally would be the end of the matter. We consider now the critical question — did the impugned documents (A, B, C, D and E) originate from the bank? In answering this question, it becomes necessary to examine the evidence and conduct of the parties, particularly the bank's conduct. We know that after the so-called 'expose' by Rafizi on 7 March 2012, P5 wrote (per letter dated 30 March 2012) to the Governor of Bank Negara Malaysia and to the Chief Executive Officer of the bank. The plaintiffs' letter dated 30 March 2011 to the bank read as follows:

> 30 March 2011
>
> Y.Bhg Tan Sri Dato' Sri Tay Ah Lek Managing Director/Chief Executive Officer
>
> 145, Jalan Ampang
>
> Public Bank Berhad Menara Public Bank
>
> 50480 Kuala Lumpur Malaysia
>
> Y.Bhg. Tan Sri Dato' Sri Tay,
>
> *FORMAL COMPLAINT AGAINST PUBLIC BANK BERHAD FOR RELEASING PRIVATE AND CONFIDENTIAL BANK DOCUMENTS ON:*
>
> 1. *NATIONAL FEEDLOT CORPORATION SDN BHD*
> 2. *NATIONAL MEAT AND LIVESTOCK CORPORATION SDN BHD*
> 3. *AGROSCIENCE INDUSTRIES SDN BHD AND*
> 4. *MOHAMAD SALLEH BIN ISMAIL*
>
> *WITHOUT PERMISSION AND IN CONTRAVENTION OF THE BANKING AND FINANCIAL INSTITUTIONS ACT 1989 (BAFIA)*
>
> On 7 March 2012, some members of Part Keadilan Rakyat — Rafizi Ramli, Zuraida Kamaruddin and Nurul Izzah Anwar had collectively organised a news conference to release private and confidential bank documents of the above companies of which I am a director and also in respect of my personal bank account.
>
> The said Individuals had without our permission, obtained the bank's Internal customer account profile (private and confidential bank documents) sourced from Public Bank Berhad that comprised Information or our bank accounts and credit ratings.
>
> We believe Public Bank Berhad has contravened the provisions of BAFIA In releasing our private and confidential bank account Information. A copy of the news release together with the accompanying bank documents that were released to

A the media for public dissemination by Rafizi Ramli-and the PKR, and copies of our police reports are enclosed for your action.

I also feel extremely betrayed by Public Bank Berhad as your Client Charter specifically states that you are absolutely committed to providing Privacy and Security as follows —

B

– We highly respect and thoroughly appreciate your concerns on the privacy and security of all personal Information and financial transactions handled by us.

– We will employ the tightest security architecture to prevent C unauthorised access and ensure your peace of mind concerning all your transactions with us

– We will pursue the strongest form of preventive and punitive measures against any party which attempts to compromise your right to transaction security and confidentiality.

D

Public Bank Berhad's negligence has caused great detriment to our reputation and business. We require full explanation from you as to how these sensitive bank documents were leaked to third parties. We further require you to furnish this explanation within seven (7) days falling which we will institute legal proceedings against the bank.

E

Yours sincerely;

NATIONAL FEEDLOT CORPORATION SDN. BHD.

DATO' SRI DR. MOHAMAD SALLEH ISMAIL

Executive Chairman

F

Cc:

Y. Bhg. Tan Sri Dato' Sri Dr Zeti Akhtar Aziz, Governor, Bank Negara Malaysia

Enclosures:

i. Copy of PKR News Release with the alleged bank documents

G

ii. Copies of police reports (1)

[81] P1, through their Finance/Accounts Manager, Puan Hashimah bte Ahmad lodged a police report on 30 March 2012 (Travers Police H Report 002287/12) on the wrongful disclosure of the banking documents and information. Likewise P5 also lodged a police report on the wrongful disclosure of the banking documents/information (Damansara Report 006305/12). The impugned documents were attached to P5's said complaint letters and the police report. The bank said that Bank Negara Malaysia did not I take any action against the bank.

[82] In our view, the fact that Bank Negara Malaysia did not take any action against the bank is absolutely irrelevant as any action or inaction by Bank Negara Malaysia is not binding on the court. Back to the issue at hand. The

question is — in the context of the complaint that was made by P5, how did the bank treat or respond to the impugned documents? Having examined the matter comprehensively, we find that the bank took diametrically different stands when it came to the impugned documents in that their stance during the domestic inquiry was at variance with the stand taken (by Foo and Fam) at the trial. We may start with Messrs Shafee & Co's letter dated 6 April 2012 and the bank's response which was sent through the bank's solicitors Messrs Shook Lin & Bok.

[83] Messrs Shafee & Co's letter reads as follows:

Shafee & Co

6th April 2012

'WITHOUT PREJUDICE'

Public Bank Berhad (Head Office)

146 Jalan Ampang,

50947, Kuala Lumpur.

Dear Sirs,

RE: NOTICE OF DEMAND

We act for Agroscience Industries Sdn. Bhd. of 2nd Floor, No.2–4. Jalan Manau, 50460 Kuala Lumpur. National Feedlot Corporation Sdn Bhd of No.2–4, Jalan Manau, 50460 Kuala Lumpur, National Meat & Livestock Corporation Sdn Bhd of No.2–4, Jalan Manau, 50460 Kuala Lumpur and Datuk Seri Dr. Mohamad Salleh Bin Ismail of No. 10: Jalan Setiakasih 1, Bukit Damansara, 50490, Kuala Lumpur (collectively hereinafter referred to as 'our clients').

We are instructed by our clients as follows:-

(a) At all material times our clients have various banking accounts and facilities with you (the said accounts and banking facilities');

(b) On 7.3.2012 one Encik Rafizi was in possession of private and confidential Information pertaining to the said accounts and banking facilities in the form of printed documents ('the said documents') generated and/or printed on 16.2.2012 at your branch office:

(c) On 7.3.2012 Encik Rafizi also circulated and/or disseminated the said documents to various panes and public at large during a press conference held which had wide coverage both in print and electronic media:

(d) in breach of the farms of the said banking accounts and banking facilities, you have caused Encik Rafizi to come in possession of the said documents without our client's consent and/or authority, and

(e) As a result of your aforesaid breach, our clients had suffered loss and damages including serious damage to our clients' reputation.

In the circumstances we are instructed to demand from you which we hereby do the sum of RM60,000,000.00 being general damages, exemplary damages and aggravated damages.

TAKE NOTICE THAT unless the sum of RM60, 000,000.00 is paid to our clients within SEVEN (7) days of receipt: hereof we have strict instruction from our clients to proceed with legal action against you without further reference to you.

Yours faithfully.

Dato' Seri Dr. Muhammad Shafee Abdullah

Advocate & Solicitor Cc:

1. Public Bank Berhad Cawangan Hang Leidu 20-26, Jalan Hang Lekiu. 50100 Kuala Lumpur

P.O Box 10473

50714 Kuala Lumpur

2. Clients

[84] On the instructions of the bank, Messrs Shook Lin & Bok sent a letter dated 18 May 2012 to Messrs Shafee & Co which was in response to the letter dated 30 March 2012 written by P5 to the bank and the demand letter dated 6 April 2012 written by Messrs Shafee & Co. It is important to keep in mind that the domestic inquiry was conducted on 2 May 2012.

[85] Thus, by the time the letter dated 18 May 2012 was written, the bank would have been aware of the outcome of their internal investigations, the show cause, Johari's response, the charge of misconduct and the evidence which was presented at the domestic inquiry. We have already alluded to the salient parts of the domestic inquiry. The bank's said solicitor's letter to Messrs Shafee & Co reads as follows:

2. Our client instructs us that pursuant to its internal investigations on the matters raised in your said letter of 6.4.212 and your client's letter of 30.3.2012, *it appears* that one of our client's staff had, without authority, accessed our client's credit information systems in connection with your clients' information. *It appears that the said staff may have been responsible for the unauthorized printing of some of the information as attached to your clients' letter dated 30.3.2012.*

3. Our client further instructs that *it does not know who gave the printout of such information to third parties* nor who received such information. We would like to place on record that our client requires all its personnel to comply strictly with observing secrecy and the provisions of the Banking and Financial Institutions Act concerning our client's customers accounts at all times. Such disclosure of information to third parties was not authorised by our client at all.

[86] It may be recalled that as early as 24 April 2012, the bank had charged Johari with the following charge of misconduct:

Sometime between 9.25am and 9.45am on 16 February 2012, you had accessed the Bank's System via the login at PC workstation JJGWSSCN002 to perform inquiry and printing of the Customer Profile-Balance Summary for the following customers *thereby causing their information/document to be revealed, divulged and provided to unauthorized third party sometime between 16 February 2012 and 7 March 2012*:

a) Dato' Sri Dr. Mohammad Salleh bin Ismail;

b) Agroscience Industries Sdn Bhd;

c) National Meat and Livestock Corporation Sdn Bhd; and

d) National Feedlot Corporation Sdn Bhd

[87] In the circumstances, we find the letter written by the solicitors on behalf of and on the instructions of the bank to be rather odd. This is because by using the words 'it *appears* that one of our client's staff had', the bank created the impression that they were not sure whether the nefarious act had indeed been carried out by one of the bank's staff. In truth, the bank's investigations which was conducted by Foo especially the IT forensic results and the CCTV recording, revealed that Cheam had used his user ID at Johari's computer and logged into the bank's computer system and that it was Johari who used his computer and had accessed the bank's system on 16 February 2012 and performed the inquiry and printed the CP-BS for (a) Dato' Sri Dr Mohammad Salleh bin Ismail, (b) Agroscience Industries Sdn Bhd, (c) National Meat and Livestock Corp Sdn Bhd and (d) National Feedlot Corp Sdn Bhd and caused their information/documents to be revealed, divulged and provided to unauthorised third parties sometime between 16 February 2012 and 7 March 2012.

[88] The result of the domestic inquiry was that the panel was convinced that Johari had committed the act(s) of misconduct in terms of the matters stated in the charge per the bank's letter dated 24 April 2012 and found him guilty of the said charge. The truth of the matter was that it was the bank's position at the domestic inquiry that Johari was the culprit who wrongfully accessed the bank's computer system and performed the inquiry and printed the CP-BS and gave it to third parties.

[89] At the domestic inquiry, Foo and Fam gave detailed evidence as to the outcome of their respective investigations. Fam's evidence was in relation to the IT aspect of the investigations whereas Foo was the lead investigator who weaved all the parts of the evidence together and compiled an investigation report (which was not produced in court). Further proof of the bank's express or implicit acceptance as to provenance of the impugned documents may be gathered from the fact that the bank's show cause letter to Johari, the notice of domestic inquiry to Johari and indeed, the domestic inquiry against Johari was based on the impugned documents that were annexed to P5's letter dated 30

March 2012. At all material times there was no suggestion whatsoever that the impugned documents are not the bank's documents. In this regard, Foo testified at the domestic inquiry and gave evidence in favour of the bank. She was there to make out a case for the bank that Johari was guilty of misconduct as per the terms of the charge that was framed against him. She did not say that the impugned documents are not the bank's documents.

[90] Indeed, at the domestic inquiry the bank proceeded on the basis that the impugned documents were the bank's documents. Foo tracked Johari's movements where he was seen stapling the printed documents and putting them in an envelope and later seen taking out an envelope from his drawer before he left the office.

[91] Indeed, if, as the bank subsequently maintained at the trial, the impugned documents were not the bank's documents, then the bank should have informed P5 that they are barking up the wrong tree and they ought not to have taken disciplinary action against Johari which was obviously precipitated by P5's complaint letter dated 30 March 2012. During cross-examination Foo said that the impugned documents were not the bank's documents. She said:

(a) '… my investigation did not show that there was, we could not find the evidence of disclosure';

(b) 'My finding shows there is only unauthorized access of accessing and printing the documents';

(c) '… my finding shows only unauthorized access and printing from Johari. I have no evidence that he had taken out any documents from the bank …'; and

(d) '… The thing on the disclosure, whether he took it out and disclose to third party okay, there is no evidence to it. So, I did put it inside my witness statement on that. Because I cannot give any positive answer to the bank. I have no positive finding on that'.

[92] Clearly Foo's testimony during the trial was fundamentally at variance from what she said before the domestic inquiry panel. But the judge did not consider this part of the evidence, which of itself was a serious mis-appreciation of vital evidence. This stemmed in part from the judge's stance in rejecting the domestic inquiry notes as being irrelevant.

[93] Had the judge looked at Foo's evidence including what she had said the domestic inquiry and what the prosecuting officer had submitted before the domestic inquiry panel, it would be crystal clear that it was always the bank's position that the documents Annexures A-E which were annexed to P5's

complaint letter contained information (CP-BS) relating to the plaintiffs accounts with the bank and that this had indeed emanated from the bank and Johari was responsible for the extraction of this confidential information and disclosing it to third parties. Of course, there is no smoking gun evidence to show that Johari had passed the information to Rafizi but to suggest that the Annexures A-E are not the bank's documents and that there was no evidence that the confidential information of the plaintiffs were disclosed to third parties is a complete volte-face (U-turn) by the bank. The bank seemed to suggest that the Annexures A-E 'appear to be similar' to the CP-BS of the plaintiffs accounts with the bank. This is rather odd and does not sit well with its conduct vis a vis the domestic inquiry. Thus, if it is being suggested that they are not the same, then why was disciplinary action taken against Johari?

[94] The bank should have just written to P5 to say that these are not the bank's documents. The reality was otherwise. The documents which Rafizi had revealed at the press conference did in fact come from the bank and the culprit who obtained it nefariously was Johari and it was he who printed them, and took them out of the bank, and then gave them to third parties.

[95] It is clear that Foo's evidence at the domestic inquiry was at variance with her evidence during the trial. If the impugned documents were alien to the bank then she should have said so at the domestic inquiry. It is important to note that Foo was the officer who investigated P5's complaint. Of course, her investigation report was not produced at the trial, but we do not think that she was of the view (prior to the trial) that the impugned documents were not the bank's documents. That the impugned documents were not the bank's documents was a convenient, self-serving position to take at the trial so as to exculpate the bank from liability for the most egregious and outrageous public disclosure of the plaintiffs' banking information. It was clearly an afterthought.

[96] Before we leave this part of the analysis, we must state that the judge took a wrong turn in accepting the bank's evidence and concluding that the impugned documents were not the bank's documents. Had the judge carefully considered the evidence, she would have concluded that Foo's answer that the impugned documents were not the bank's documents was not credible especially in light of the bank's response (per Shook Lin & Bok's letter dated 18 May 2012), the bank's show cause letter to Johari and notice of domestic inquiry and the conduct of the bank during the domestic inquiry where the impugned documents (Annexure A, B, C and D) were tendered in evidence.

[97] We are cognisant of the fact that the domestic inquiry was conducted in respect of Annexures A, B, C and D. But somewhere along the way, the prosecuting officer made reference to Annexure E as well. It is unclear whether Annexure E was produced as a document at the domestic inquiry. In any event,

A even without Annexure E, it is clear that the bank did not disavow ownership of the impugned documents during the domestic inquiry.

[98] We turn now to Cheam. Cheam conceded during cross-examination that he did not carefully monitor Johari. If he had paid attention to what Johari B was doing, Cheam might have spotted that Johari was indulging in some sort of nefarious activity and could have prevented the wrongful disclosure of the impugned documents.

C **[99]** Counsel for the plaintiffs suggested that Cheam was somewhat 'in pari delicto' with Johari. We think that there is no basis to impute anything sinister to Cheam. His fault was in allowing his user ID to be used to enable Johari to have access to the bank's IBM mainframe and putting his trust in Johari and assuming (without checking) that Johari would only make legitimate work D related inquiries and not engage in nefarious activity, namely, wrongfully accessing the accounts, downloading, printing and later disclosing these impugned documents to third parties or unauthorised parties (as per the terms of the charge of misconduct against Johari).

E **[100]** Of course, counsel for the plaintiffs said that Cheam only received a 'slap on the wrist' in that his performance bonus was halved. It is important to keep in mind that as far as the evidence was concerned, Johari was the culprit, and not Cheam.

F **[101]** It is important to recall that Cheam had enlisted Johari to help out with credit assessments for loan applications and it was for that purpose that Cheam had used his user ID in Johari's computer and logged into the system. It was Johari who seized the opportunity and surreptitiously accessed the accounts of G the plaintiffs and thereafter printed the CP-BS and placed them in an envelope and took them out at the end of the working day.

[102] According to the charge of misconduct, Johari is alleged to have disclosed the banking information to third parties or unauthorised parties. We H have to now deal with yet another critical issue, on which the judge made a finding against the plaintiffs. *Who gave the impugned documents to Rafizi*? The bank's defence and their position at the trial was that they do not know who gave it to Rafizi.

I **[103]** Looking at all the circumstances, it would take very little to tilt the probabilities in favour of the conclusion that it was Johari who had handed over the impugned documents to third parties and these then eventually found their way into Rafizi's hands. The rest is, as they say, history. Ultimately, it is what Johari did, that facilitated the disclosure of the impugned documents to Rafizi.

[104] Another point that we wish to address is that the judge drew an adverse inference against the plaintiffs for not calling Rafizi and Johari. Clearly, it would have been suicidal for the plaintiffs to call Johari and Rafizi as these persons are likely to be antagonistic to the plaintiffs and they would be stuck with whatever answers that these witnesses gave in response to questions posed by counsel.

[105] In our view, the judge was wrong invoke an adverse inference under s 114(g) of the Evidence Act 1950. As for the failure to call Hashimah bt Ahmad, we do not think that the judge should have drawn an adverse inference for not calling her. The judge seemed to think that she was not called because of P5's answers that she was the one who dealt with the bank and that he (P5) could not say whether she had the leaked the impugned documents. Of course, during cross-examination it was put to P5 that the bank's manager who went over to P1's office would give the bank statements and CP-BS to Hashimah bte Ahmad (Finance/Accounts Manager) to which he answered in the affirmative.

[106] But we rather think that whilst P5 may have answered in the affirmative, the issue of CP-BS being given to the bank's customer is a non-starter as there is absolutely no evidence that the customers are even shown the CP-BS and/or given copies of the same. The judge was too quick to jump to the conclusion that Hashimah, if called, may have been put in an invidious position of having to answer inconvenient questions. To close on this point, we are of the view that the judge wrongly drew an adverse inference against the plaintiffs.

[107] The next point is s 97(2) of the BAFIA. The bank has relied on s 97(2) of the BAFIA to exonerate themselves from liability by asserting that the banking information that may be gleaned from the impugned documents (Annexure A-E) was already in the public domain. Now, s 97(2) reads as follows:

> (2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.

[108] We have trawled through the evidence and we agree with the submissions that were made by counsel for the plaintiffs that there is no evidence that any of the confidential information was in the public domain prior to 7 March 2012.

[109] To conclude on the issue of liability, we are of the view that there was serious mis-appreciation of evidence as elaborated above, which warrants

appellate intervention on our part. In the case before us the judge ignored vital evidence in particular, the testimony of Foo before the domestic inquiry panel and indeed the bank's stance vis a vis the charge of serious misconduct against Johari (breach of s 97(1) of the BAFIA).

[110] The judge also erred in making a ruling during the trial that the notes of the domestic inquiry proceedings were irrelevant. As we said in the early part of this judgment, the previous judge had already granted order in terms of encl 107 and it must therefore mean that *relevancy* had already been established.

[111] The issue of relevancy was settled and cannot be revisited during the trial. The issue was res judicata. The judge misdirected herself in ruling that the plaintiffs' counsel (DM) is not entitled to put questions to the bank's witness with reference to the notes of the domestic inquiry which were highly relevant. In short, counsel for the plaintiffs was not allowed to develop his case by way of a sustained cross-examination.

[112] We are impelled to the view that based on the evidence and materials placed before the court at trial, any reasonable tribunal would have concluded that the plaintiffs had discharged their burden of proving that Johari had wrongfully accessed the CP-BS of the plaintiffs' accounts and downloaded and printed the same and handed them to third parties and this had eventually facilitated disclosure to Rafizi who used it during the press conference on 7 March 2012.

[113] We were mindful of the fact that in reaching her conclusion, the judge had the audio/visual advantage which this court is deprived of. We are however satisfied that there were fundamental lapses in the judicial evaluative process which vitiated the judge's decision that the impugned documents did not come from the bank and that there was no evidence that Johari had disclosed the impugned documents to certain parties, and which ultimately found their way to Rafizi.

[114] The real question is whether as a matter of probabilities the plaintiffs had proven that by reason of Johari's surreptitious conduct, Rafizi managed to have access to the impugned documents. In our view, the evidence pointed irresistibly to the conclusion that it was Johari's conduct which led to the ultimate disclosure at Rafizi's press conference on 7 March 2012. In all the circumstances, the judge's decision that the plaintiffs had failed to prove that the bank had breached the implied duty of confidentiality and secrecy, was in the circumstances, *plainly wrong*.

[115] This is clearly a case where the judge had reached a conclusion which no

reasonable judge could have reached. See: *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 (CA) (per Nallini JCA — now FCJ) at p 437. Hence, appellate intervention is warranted in all the circumstances. We therefore allow the appeal on liability and set aside the judgment of the High Court and enter judgment on liability for plaintiffs (P1, P2, P3 and P5). We turn now to damages.

DAMAGES

[116] In this case, the plaintiffs have asked for general damages, aggravated and exemplary damages. It is important to note that the trial was not bifurcated. Thus, the plaintiffs adduced evidence on the quantum of loss suffered as a result of the breach of confidentiality on the part of the bank.

[117] Essentially, the plaintiffs relied on the evidence of Zakaria bin Mohammad (PW3) who was a financial consultant. But the judge evaluated PW3's evidence and rejected it. As such, no damages were awarded. The law on damages is quite well settled.

[118] In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 (SC) Edgar Joseph Jr SCJ said at p 416:

> Now, those being my findings of fact on the issue of liability, and they are findings in favour of the plaintiffs in respect of both trespass and nuisance, *I must now address the question of the quantum of damages.*
>
> The general rule as to the measure of damages, a rule equally applicable to tort as to contract, was defined by Lord Blackburn in *Livingstone v Rawyards Coal Co* 82, at p 39 in these terms: *'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation'*. In *Munnelly v Calco* 83, Henchy J said, at p 399:
>
> ... the particular measure of damages allowed should be objectively chosen by the court as being that of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as pecuniary awards can do so.
>
> Before I proceed to assess the quantum of damages, *I would remind myself of certain other well-established principles which I should keep in the forefront of my mind in considering this part of the case.*
>
> *First, when a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable.*
>
> *Secondly*, I would refer to what Lord Goddard said in *Bonham-Carter v Hyde Park Hotel Ltd* 84, at p 178:
>
> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak,

throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

Thirdly, on the *quality of evidence* expected of a plaintiff, it is necessary to remember what Devlin J (as he then was) said in *Biggin & Co v Permanite* 85, at p 438, namely, that *where precise evidence is obtainable, the court naturally expects to have it; where it is not, the court must do the best it can. Nevertheless, it remains true to say that that generally, difficulty of proof does not dispense with the necessity for proof.* (See *Aerial Advertising Co v Batchelors Peas (Manchester)* 86 at p 796 per Atkinson J). The case of *Ashcroft v Curtin* 87 illustrates this point, for there the plaintiff, claiming for diminution of profits of his one-man business, failed in his claim despite the evidence pointing to a decrease in the company's profitability due to the injury, the records relied on being too rudimentary and the accounts too unreliable to quantify the loss.

[119] And as for whether aggravated and exemplary damages are claimable in a breach of contract case, it is relevant to refer to the judgment of Lee Swee Seng Judicial Commissioner (as he then was — now JCA) in *Ang Beng Choo v RHB Insurance Berhad* [2013] 1 LNS 382 (HC) where the learned judge said:

Damages

Whether aggravated and exemplary damages are claimable for breach of contract

The basis for assessment of damages in a breach of contract is to put the plaintiff, the non-defaulting party, in the position as if the contract has not been wrongfully terminated. It is compensatory in nature. As such aggravated damages is generally not awarded for a breach of contract simpliciter. In this respect the House of Lords decision in *Farley v Skinner* [2002] 2 AC 732 summarised succinctly the general principle in a breach of contract against an award for anxiety, distress, disappointment and loss of credibility, reputation and the like as follows in the speech of Lord Hitton at p 757–758:

> 47. It is clearly established as a general rule that where there has been a breach of contract damages cannot be awarded for the vexation or anxiety or aggravation or similar states of mind resulting from the breach. The principle was stated by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445:
>
> > A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.
>
> This general principle has recently been approved by this House in *Johnson v Gore Wood & Co* [2002] 2 AC 1. The principle has particular application to commercial cases and in *Johnson v Gore Wood & Co Lord Cooke of Thorndon observed*, at p 49, that: 'Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude'.

But the principle is not applicable in every case and in *Watts v Morrow* [1991] 1 WLR 1421 Bingham LJ went on to state that there was an exceptional category of

cases which he described as follows:

> Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

Bingham LJ then stated:

> In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.

The exceptions do not apply in this case for a breach of an Agency Agreement.

Generally no exemplary damages shall be awarded in a contractual claim, and the weight of authorities is against granting such an award. The learned author of *Guest on Contract* (28th Ed) is categorical on this ('vindictive' or 'exemplary' damages have no place in the law of contract'; p 592), while *Mcgregor on Damages* (18th Ed) has this to tell us at p 428:

> For contract, on the other hand, the position is less certain. Historically, the law has always set its face against awarding exemplary damages for breach of contract; outrageous conduct is the domain of tort rather than contract.

Even when the Supreme Court of Canada in *Royal Bank of Canada v W Got & Associates Electric Ltd Et al* 178 DLR (4th) 385, approved and awarded exemplary damages in a breach of contract claim it cautiously observed as follows at pp 394–395 that such an award would be most exceptional and extraordinary:

> The trial judge and the Court of Appeal awarded exemplary damages for the egregious conduct of the bank and we would not disturb this finding. Punitive damages are available for breach of contract, although, as Mclntyre J held in *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085 ..., the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare ...
>
> We emphasize ... that an award for exemplary damages in commercial disputes will remain an extraordinary remedy.

The celebrated author Visu Sinnadurai in the *Law of Contract* (3rd ed) was of the same view too at p 731, para 13.38, Vol 1):

> It is only in extremely rare cases that the courts grant exemplary damages. This type of damages if granted, is usually to punish the Defendant. Under English law, the only category of contracts in which such damages had been granted were in actions for breach of promise of marriage. But since the abolition of such actions in 1970 by the Law Reform (Miscellaneous Provisions) Act 1970, it would appear that exemplary damages will no longer be granted by the English courts for any action for breach of contract. Since the decision of the House of Lords in *Rookes v Barnard*, even the award of such damages in tort is now restricted.

Even in a breach of contract of employment generally no aggravated and exemplary damages are awarded. In *Penang Port Commission v Kanawangi s/o Seperumaniam* [1996] 3 MLJ 427; [2002] 8 CLJ 503 at pp 434–435, His Lordship Mahadev Shankar JCA observed:

> There are other very disturbing features about this litigation. *Addis v Gramophone Co Ltd* [1909] AC 488 is well-entrenched in the common law, and *damages cannot be awarded for the manner of the dismissal of his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment*. We are at a total loss to understand on what basis the deputy registrar thought fit to award a huge round sum of RM2m under this head.
>
> The respondent refused to turn up for work on 1 March 1985 claiming that he had been constructively dismissed. It is far from clear whether the deputy registrar considered the respondent's duty to mitigate his damage. Furthermore, the respondent claimed that he was entitled to be confirmed as traffic supervisor because he thought he was qualified for the post. The undeniable fact is that he was never appointed to that post by the appointing authority. The basis on which the deputy registrar proceeded to calculate the alleged 'arrears' of emoluments due to the respondent from 1 March 1985 (as also the award of RM2m) would have been an unsolved mystery, at least until the deputy registrar's notes of evidence and grounds of judgment became available. *Damages are not awarded simply because the plaintiff has thrown them at the head of the court*. The loss must be shown to have actually occurred and also be recoverable in law before the award can be made. (Emphasis added.)

See also the helpful article 'Exemplary Damages for Tort and Breach of Contract in Selected Common Law Jurisdictions' by Abdul Majid bin Nabi Baksh [2007] 3 MLJ xcvii.

[120] In *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] SGCA 26; [2017] 2 SLR 129 the Singapore Court of Appeal (per Justice Andrew Phang) unequivocally enunciated that punitive damages are not claimable in breach of contract claims. The learned judge gave a number of reasons why punitive damages are not claimable in a breach of contract situation. They may be stated as follows:

> (f) In so far as the issue relating to the possible award of punitive damages in a purely contractual context was concerned (and considering, first, the arguments against the award of such damages), allowing the courts to punish a party who had breached a contract sat uneasily with the concept of a contract as an obligation arising from a voluntary and binding agreement. The courts ought to have but a minimal role in regulating the contracting parties' conduct without regard to their agreement.
>
> It would be anomalous or even inappropriate for the court to regulate the contracting parties' conduct by imposing an award of punitive damages on the party in breach by way of what is in effect an external standard. The standard was an external one because, with the award of such damages, the court went further to signify its own outrage at the contract- breaker's conduct, and to communicate its

own view of what proper commercial behaviour should be. Such an external standard might be said to be antithetical to the very nature and function of the law of contract in general and its remedial structure in particular. In contrast, the law of tort afforded far more latitude to the courts in regulating conduct between the parties; it imposed standards of normative behaviour between complete strangers: at [68], [71], [72] and [74].

(g) The argument based on a 'remedial gap' — that it was necessary to have a residual discretion to award punitive damages in contract law because existing remedies were inadequate to punish and deter outrageous behaviour — was neutral at best. If the concepts of punishment and deterrence were inapposite in the context of the common law of contract, there would be no gap in the first place. Such a gap could, in any event, be filled by alternative remedial options, such as 'Wrotham Park damages', an account of profits for breach of contract, or damages for mental distress. These arguably had punitive or deterrent effects even though they remained primarily compensatory in purpose in that they protected a plaintiff's interest in contractual performance: at [78] to [84].

(h) Another argument against recognising punitive damages for breach of contract was the absence of clear criteria by which to determine when punitive damages should be awarded, and the consequent uncertainty this would lead to. The concept of an 'outrageous' breach was particularly elusive in the commercial context where self-serving behaviour was an accepted facet of contracting norms. It would be very difficult to identify specific (as well as workable) criteria for ascertaining when a contracting party's conduct had crossed the line from self or vested interest into the realm of the 'outrageous': at [85], [86] and [89].

(i) The weight of case law authority was also against the recognition of punitive damages for breach of contract though this was not necessarily conclusive of the issue: at [101].

(j) Policy considerations also militated against the award of punitive damages in a purely contractual context. Awarding punitive damages in a purely contractual context might adversely affect the manner in which litigation would be conducted inasmuch as it might add to its length, complexity and costs and confer upon plaintiffs an undue advantage in forcing large (or larger) settlements. Further, punitive damages were most commonly awarded in circumstances where there was a heightened risk of recurrent reprehensible conduct, especially where the parties were of unequal bargaining power, such as in insurance, employment and consumer transactions. Such risk would be more appropriately managed by regulation rather than by judicial remedies such as an award of punitive damages: at [102], [104] and [106].

(k) Turning to the arguments in favour of an award of punitive damages in a purely contractual context, first, the argument from uniformity — that it would be inconsistent to recognise punitive damages in tort but exclude punitive damages from contract claims — was unpersuasive because the law of tort was qualitatively different from the law of contract: at [110] and [111].

(l) The Canadian case of *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257 ('Whiten'), the key authority relied on by the judge, was not persuasive authority for the availability of punitive damages for breach of contract. *Whiten* held that punitive damages could be awarded where the conduct complained of

constituted the breach of an independently actionable wrong — the breach of a contractual duty of good faith. But there was no reason in principle why a single breach of contract ought not also to justify an award of punitive damages; if it was the egregious nature of the conduct of the party in breach that was being punished, it ought not to matter whether that conduct was the result of a single breach or more than a single breach: at [112], [114], and [115].

(m) As the amicus curiae had also pointed out, Whiten has been subject to no small measure of criticism (significantly, from a number of eminent academic experts in the field of Canadian contract law, one of whom was of the view that *Whiten* may not be a true authority for the award of punitive damages in a purely contractual context as there were features of the case not common to ordinary commercial contracts, such as quasi- regulatory interests, and as it was also a case involving tortious defamatory conduct): at [117] and [118].

(n) The principles in *Whiten* were also not persuasive because the court assumed that there was no difference in principle between awarding punitive damages in tort and in a purely contractual context; the broader issue of principle — why punishment was a legitimate remedial response to a breach of contract — was not really dealt with. The principle of proportionality, which attempted to impose a rational limit on punitive damages awards, did not furnish sufficient guidance and had led in turn to uncertainty: at [121] to [123], and [126].

(o) Further, it was not clear whether *Whiten* recognised the availability of punitive damages for all contract breaches or only certain types of contracts where was a material power imbalance, or more generally contracts where there was a duty of good faith: at [127] and [128].

(p) The existence of a duty of good faith would not, on its own, justify an award of punitive damages in the event of its breach, although it might help overcome one of the objections in principle to punitive damages for breach of contract: the undesirability of a court imposing on the parties its own normative standard of contractual performance. However, it did not necessarily follow that punitive damages ought to be awarded; the existence of an express or implied duty of good faith was a neutral factor: at [134].

(q) The arguments against the award of punitive damages far outweighed the arguments in favour of such an award. There ought to be a general rule that punitive damages could not be awarded for breach of contract: at [135].

(r) Given that *PH* had at most been grossly negligent, this was not a situation which merited an award of punitive damages. Even if fraud had been established, this was hardly an exceptional case warranting a departure from the general rule: at [138] and [139].

(s) Cl 25 excluded consequential and indirect losses suffered by the contracting parties as well as third parties arising out of the (defective) performance of the SPA in question, but not consequential or indirect losses arising from a refusal to perform the contract or to be bound by it. Airtrust's claims for loss of profit and the loss of opportunity for earning further profits were consequential and indirect losses and therefore excluded by Cl 25: at [151], [153], [155] and [156].

(t) Airtrust sought indemnity costs in respect of the entire trial. The specific instances of unreasonable conduct it had alleged, even if made out, only affected a few of the issues in dispute and a few witnesses. There was no reason to disturb the Judge's decision not to order an award of indemnity costs against *PH*: at [158].

[Observation: Given that the instances in which a breach of contract can occur were manifold, the court would not rule out entirely the possibility that a case might one day come before the court, involving a particularly outrageous type of breach, which necessitated a departure from the general rule that punitive damages would not be awarded for breach of contract. That said, any argument for the award of such damages would need to surmount the many reasons of principle and policy set out in the judgment against doing so. It would therefore take a truly exceptional case to persuade the court that punitive damages should be awarded for breach of contract. Indeed, the court was not sure that it would award such damages even if it were faced with the facts of a case as extreme as Whiten. There were a number of other possible alternative remedies (including the award of damages for mental distress for breach of contract) that could also be invoked by the court to do practical justice while respecting the compensatory function of damages for breach of contract: at [136].]

Damages for breach of confidentiality

[121] In *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] SGCA 32; [2020] 1 SLR 1130 the Singapore Court of Appeal opined that for breach of confidence claims, the courts may have to consider a *modified approach* to the question of damages as there may be circumstances where the plaintiff may not be able to prove a loss as result of the wrongful disclosure of confidential information. In some cases there could be wrongful gain (monetary or otherwise) by the wrongdoer. It would all depend on the circumstances.

[122] In that case, the trial was bifurcated and the Court of Appeal remitted the case to the High Court for assessment of damages on the basis of 'equitable damages'. But as we said, the trial here was not bifurcated and the plaintiffs have had their opportunity of proving all the heads of damages as pleaded. But they failed in their endeavor to prove substantial damages.

Appellate interference — Damages

[123] In so far as we are concerned, on the question of damages, we have examined the judge's reasons for dismissing the claim for damages. The judge's reasons are to be found in paras [123]–[140] of her grounds of judgment. Having regard to the entire matrix of facts and based on the documents and contemporaneous conduct of the parties and oral testimony of the witnesses, the judge concluded that the plaintiffs had failed to prove the claim for general damages, aggravated and exemplary damages.

[124] Indeed, in the case law authorities alluded to earlier, aggravated and exemplary damages are not even claimable for cases of breach of contract (see: *Ang Beng Choo* and *PH Hydraulies*). Quite clearly the outcome of this case turned primarily on the adequacy of the evidence to sustain the claim for general damages of RM60m. PW3's evidence was found to be wanting in material respects.

[125] In our view, based on the evidence led during the trial, it cannot be said that the judge's conclusion upon the question of damages was plainly wrong. Having considered the matter carefully, and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case vis a vis damages.

[126] For completeness we should add that in this case the bank clearly did not 'gain' from the wrongful disclosure by Johari. If anything, the bank had sustained reputational damage as this episode of wrongful disclosure went completely against the bank's client charter which gave the customers the assurance that their banking information and details would be kept confidential at all times. At the same time, because of PW3's inadequate and unconvincing evidence on damages that were said to have been suffered by the plaintiffs as a result of Johari's wrongful disclosure, the claim for general damages was dismissed. But that is not the end of the matter. In cases of breach of confidence, the innocent party (plaintiffs here) may not be able to show any real loss as a result of the wrongful disclosure.

[127] In those circumstances, it may well be that the court ought to take a modified approach as discussed by the Singapore Court of Appeal in *I-Admin* case where the case was remitted to the High Court for assessment of damages on the basis of 'equitable damages'. However, in this case the question of equitable damages was not ventilated in the High Court and neither was it brought up during submissions. But given the way the case was conducted in the High Court where both liability and quantum were dealt with at the trial without being bifurcated, we do not see how we could even consider remitting the case to the High Court for assessment of equitable damages as that would be akin to giving the plaintiffs a second bite of the proverbial cherry.

[128] In our view the learned judge, having considered all the evidence, was fully entitled to reach her evaluative judgment as per the grounds of judgment vis a vis damages. Although the plaintiffs severely criticised the judge's approach and reasoning on the issue of damages, we are not persuaded that the judge's approach was erroneous, the reasoning flawed, or the conclusions wrong.

[129] We conclude by referring to the reminder by the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 1 LNS 1060; [2020] 8 AMR 227 (FC):

> As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

Nominal damages

[130] Since the plaintiffs have failed in their claim for substantial or any damages, the question is whether we should award nominal damages. In *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA) the Court of Appeal held:

> [94] Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. Although this is one of many situations in which nominal damages may be awarded, 'it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss' (see *McGregor on Damages*, Chapter 10).
>
> [95] In the instant case, the issue is one of proof rather than absence of loss. It is an absence of evidence of the amount of loss.
>
> [96] As Lord Halsbury LC succinctly stated in *The Mediana* [1900] AC 113:
>
> ... Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.
>
> [97] In the instant case, we find that the respondent has clearly failed to prove this loss which was allegedly suffered from the appellant's breach of contract. In a situation where there is an infringement of a legal right such as this but where there is no basis for ascertainment of the amount of loss suffered, a nominal damage may be awarded (see *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113).

[131] As the plaintiffs have succeeded on liability but have failed to prove damages, we are of the view that we should order nominal damages. We therefore award a sum of *RM10,000* as nominal damages with interest thereon at 5%pa from 22 May 2012 until the date of full payment or realisation.

A OUTCOME

[132] The plaintiffs' appeal on liability is allowed. P4's appeal is dismissed as they have no claim against the bank. The High Court's order on liability is set aside. The High Court's decision to dismiss the claim for substantial damages, aggravated damages and exemplary damages is affirmed. We award a sum of RM10,000 as nominal damages with interest thereon at 5%pa from 22 May 2012 until the date of full payment or realisation.

[133] Our decision to award nominal damages prompted counsel for the bank to argue that the plaintiffs are not successful parties. As such, the plaintiffs should not be awarded costs. Counsel said that the plaintiffs should instead be ordered to pay costs to the bank. Alternatively, that there be no order as to costs.

[134] In this regard, counsel referred to Justice Devlin's judgment in *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 (HC) where he said (p 874 of the judgment) — 'it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a 'successful' plaintiff'.

[135] But, having read the case carefully we noted that in the same paragraph Justice Devlin said, 'In certain cases he may be, eg, *where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained*. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is *necessary to examine the facts of each particular case*'. (Emphasis added.)

[136] Having considered the legal position as enunciated in the case referred to above, our decision on costs is as follows. We are of the view that the plaintiffs have proven that the bank was in breach of their implied contractual duty to maintain and protect the confidential information, ie plaintiffs' banking information and details (CP-BS).

[137] Thus, the plaintiffs are indeed successful parties, albeit that they were awarded nominal damages. We are of the view that based on the facts and circumstances of the case here, the plaintiffs are entitled to costs of the proceedings in the High Court and in the Court of Appeal. As such, we set aside the costs ordered by the High Court in the sum of RM350,000.

[138] We therefore order the bank to pay RM500,000 (Ringgit five hundred thousand) to the plaintiffs, as costs here and below (subject to allocator). The interlocutory costs previously ordered by the High Court are maintained.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh